93-385 IN THE

Supreme Court of the United States

October Term, 1993

Supreme Court, U.S.
FILED
SEP 7 1993
OFFICE OF THE CLERK

GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., and UNION CARBIDE CORPORATION,

Petitioners,

against

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

ALGIRD F. WHITE, JR., ESQ.*
BARBARA S. BRENNER, ESQ.
COUCH, WHITE, BRENNER, HOWARD & FEIGENBAUM
540 Broadway, P. O. Box 22222
Albany, NY 12201-2222
(518) 426-4600

Attorneys for Petitioners General Mills, Inc., Bethlehem Steel Corporation, Nabisco Brands, Inc. and Union Carbide Corporation

*COUNSEL OF RECORD

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(3335—LC10-428—1993)

QUESTIONS PRESENTED

This petition for a writ of certiorari concerns implementation of a portion of the Niagara Redevelopment Act, 16 U.S.C. § 836(b)(3), by the Power Authority of the State of New York.

The questions presented are:

Does the decision of the United States Court of Appeals for the Second Circuit determine an important and unresolved question of law that should be reviewed and decided by this Court when Congress, pursuant to an international treaty, has adopted a plan for the redevelopment of hydroelectric resources of the Niagara River and the Court's decision grants unfettered discretion over a fundamental element of the Congressional plan to a New York State authority in contravention of the plain language of the statute and the intent of Congress?

Does the decision of the United States Court of Appeals for the Second Circuit determine an important and unresolved question of law that should be reviewed and decided by this Court when the decision of the Court destroys the sole distinguishing characteristic of a benefit created by Congress as an integral part of a plan for the redevelopment of the Niagara River when a New York State authority was entrusted with the administration of the Congressional plan?

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14 and 29.1 of the Rules of the Supreme Court, the petitioners[1] submit the following statement identifying their respective parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

GENERAL MILLS, INC.

PARENT COMPANY: General Mills, Inc.

SUBSIDIARIES & AFFILIATES:

Almacenadora de Oriente, S.A.
Altcare Corporation
Cereal Partners Espana, A.E.I.E.
Cereal Partners France SNC
Cereal Associados Portugal A.E.I.E.
Cereal Partners U.K.
C.P.D. Cereal Partners Deutschland GmbH & Co. oHG
C.P.D. Cereal Partners Deutschland Verwaltungsgesselschaft mbH

[1]Effective July 1, 1992, Union Carbide Corporation spun off its industrial gases subsidiary, Union Carbide Industrial Gases, Inc., which has been renamed Praxair, Inc. Praxair, Inc. is a separate publicly held company, the stock of which is traded on the New York Stock Exchange. Praxair, Inc. made a motion to the United States Court of Appeals for the Second Circuit to be joined as a party plaintiff. The motion was denied.

CPW Mexico S.A. de C.V.
CPW S.A.
Elder Homestead Corporation
The Galley Club, Inc.
General Mills Belgium, SNC
General Mills de Panama, S.A. (GEMPAN)
General Mills Restaurants of Baltimore, Inc.
GMEAF SNC
Grandes Molinos de Venezuela, S.A. (GRAMOVEN)
Industria del Maiz, S.A. (IMASA)
Industria Harinera Guatemalteca, S.A. (INHSA)
Industria Tecnica Panamericana, S.A.
Olive Garden of Texas, Inc.
Productos Spain
Programacion y Computacion, S.A. (PROCOMSA)
Red Lobster Inns of Suburban Green Bay, Inc.
Red Lobster Japan Partners
Red Lobster of Texas, Inc.
Riggins & Robbins
Semolas de Panama S.A.
Snack Ventures Europe, SCA
Trattoria Lounge, Inc.
Triticus S. A.

BETHLEHEM STEEL CORPORATION

PARENT COMPANY: Bethlehem Steel Corporation

SUBSIDIARIES AND AFFILIATES:

Chiles-Alexander International Inc.
Double G Coatings Company, L.P.

Double G Coatings, Inc.
Empreendimentos Brasileiros de Mineracao S.A.-E.B.M.
G&A Limited Partnership III - A
Griffin-Alexander International, Inc.
India Offshore Inc.
Indiana Pickling and Processing Company, an Indiana General Partnership
Iron Ore Company of Canada
CENTEC Company, a Joint Venture
Presque Isle Corporation
Seadrill, Inc.
Walbridge Coatings, an Illinois Partnership
Rig V Limited Partnership
Ontario Iron Company
Rig VI Limited Partnership
Bethlehem Singapore Private Limited
Carol Lake Company, Ltd.
Gulf Power Company
Quebec North Shore and Labrador Railway Company Inc.
Retty Metals, Ltd.
Iron Ore Land Company
Northern Land Company, Limited
Schefferville Power Company
Twin Falls Power Corporation Limited
Mineracoes Brasileiras Reunidas-MBR

NABISCO BRANDS, INC.

PARENT COMPANY: RJR Nabisco, Inc.

SUBSIDIARIES AND AFFILIATES:

Gelatinas Ecuatorinas S.A.
Industrias Nabisco Cristal, S.A.
Mahachai Holding Co. (In liquidation)
Mexican Foods Limited (In liquidation)
Nabisco (Thailand) Limited (In liquidation)
Nabisco S.A. de C.V.
Nabisco/Cetus Food Biotechnology Research Partnership
Sociedade Brasileira Beneficiadora de Cha Ltd.
West Indies Yeast Company Ltd.
Yili Nabisco Biscuit & Food Company Limited (Partnership)

UNION CARBIDE CORPORATION

PARENT COMPANY: Union Carbide Corporation

SUBSIDIARIES AND AFFILIATES:

Ace Polymer Company, Limited
ACM Services, Inc.
Ace Limited
Agri-Diagnostics Associates
Agromore, Ltd.
Alberta & Orient Glycol Company Limited
Alestra Energy Company

American Acetyls
Asia Pacific Microballoons Sdn. Bhd.
Asia Pacific Phenolics Sdn. Bhd.
C&M Finance and Trading B.V.
Carbographite Limited
Clark Chemical Industry Company, Ltd.
Commercial Alcohols Limited
Commercial Alcohols Reg'd.
DCS Capital Partnership
Elektrode Maatskappy Van Suld-Afrika (Elendoms) Beperk EMSA
Elocar Company
Hokuetsu Kasei (Chemical) Co., Ltd.
Hokuetsu Kasei Shoji (Trading) Co., Ltd.
International Diagnostic Systems Corp.
Keren Limited
Kyowa Shokal Co., Ltd.
Nepal Battery Company Limited
Nikki-Universal Co., Ltd.
Nippon Unicar Company Limited
Osaka Hokuetsu Kasei Co., Ltd.
Parylene Japan K. K.
Petromont and Company, Limited Partnership
Petromont Inc. (Management Company)
Poly Pack
Polypropylene Partnership
RC Development Associates Limited Partnership
Sankyo Plastics Co., Limited
Seadrift Polypropylene Company
Shanghai Guang Yang Shoes Co.
Shanghai UCC-UOP Molecular Sieve Co., Ltd
Shawinigan Pipeline Reg'd.
Suzhou Su Hong Craft Shoes Co.

Tenngasco Gas Gathering Company
Thalassa Produtos Quimicos Ltda.
Thermo
Tsuda Wire & Cable
UCAR Carbon Canada Inc
UCAR Carbon Company Inc
UCAR Carbon France S.A.
UCAR Carbon Mexicana, S. A. de C. V.
UCAR Carbon Navarra S. A.
UCAR Carbon S. A.
UCAR Interam/EXXON
Umetco/H-B Limited Partnership
Union Carbide Argentina S.A.I.C.S.
Union Carbide Benelux N. V.
Union Carbide Comercial Chile Ltda.
Union Carbide India Limited
Union Carbide Investimentos e Participacoes S/C Ltda.
Union Carbide (Guangdong Zhongshan) Company Limited
Union Carbide Lanka Limited
Union Carbide Marble Care, Inc
Union Carbide Pakistan (Private) Limited
Union Carbide Productos Quimicos Ltda.
Union Carbide - Hecia Joint Venture
Union Carbide - Rajah Joint Venture
Union Marine Transport Company
Union Polymers Sdn. Bhd
Union Showa K. K.
UOP
UOP Management Services (Saudi Arabia) Ltd
Visking do Brasil S. A.
Vitaphore Wound Healing

Wako Jushi Co., K.K.
White Martins Productos de Carbono S. A.
World Ethanol Company

PRAXAIR, INC.

PARENT COMPANY: Praxair, Inc.

SUBSIDIARIES AND AFFILIATES:

3R Associates S.p.A.
Altair Gases and Equipment, Inc.
Andaluza de Gases S.A.
Anidride Carbonica Italia S.p.A.
Argon S.A.
Arlasa S.A.
Beijing Praxair, Inc.
Cane Associates Limited
Carbitalia S.p.A.
Carbogas S.p.A.
Carburo del Cinca S.A.
Cia. Nacional de Calcareos e Derivados "Concal"
Cia. Nacional de Carbureto
Clements Welding & Machinery Company, Inc.
Compania Navarra de Oxigeno S.A.
Compressione Gas Technici S.p.A.
Concal-Carbureto de Calcio S.A.
Empresa Brasileira de Cilindros Ltda. "CILBRAS"
Empresa Brasilerira de Reflorestamento e Agro-Pecuaria Ltda. "EMBRAL"
F. H. Bathke Company
Ferrygas S.A.

Fracchia Hermanos, S.A.
Frao-Finaziaria S.p.A.
Frao-Industriale, S.p.A.
Fracchia Hermanos, S.A.
Gacesa
Gases Ensenada S.A.
Gas Tech, Incorporated
Gastronomia Baska
GenEx Minnesota, Ltd.
GenEx, Ltd.
Genesis Systems Group, Ltd.
Genesis, Ltd.
Gopher Welding Supply Co.
Hispano Sueca de Soldadura S.A.
HydroGEN Supply Company
I.GA.T. Industria Gas Tecnici S.p.A.
IGI-Italiana Gas Industriali S.p.A.
Indugas N.V.
Industria Triestina Gas Compressi S.p.A.
IPPO S.p.A.
IWECO, Inc.
Istragas
Iwatani Industrial Gases Corp.
Jacksonville Welding Supply, Inc.
Kempengas B.V.
Linde de Mexico, S.A. de C.V.
Locatelli Ossigeno S.r.l.
Medigas Canada Inc.
Medigas Homecare Services Lakehead Ltd.
Monte Bravo S.A.
Munenzer Corporation
Niject Services Company
Nitropet, S.A.

Novigas
Operadora Perinorte, S.A. de C.V.
Ossigas S.p.A.
Oxigenio Edy, S.A.
Oxigeno del Norte, S.A.
Oxigenus S.A.
Oximesa S.A.
Oximinas Ltda.
Oxisud S.p.A.
Oxygene Rioux Inc. (Rioux Oxygen Inc.)
P.T. Sepanjang Surya Gas
Quimica Basica S.A.
Rapidox Gases Industriais Ltda.
Rhee (Beheer) B.V.
Rivoira S.p.A.
S & L Cogeneration Company
S. A. White Martins
SACI S.p.A.
SEO S.p.A.
SIAD - Societa Italiana Acetilene e Derivati S.p.A.
Seoul Cold Air Products Co., Ltd.
Servicios Administrativos Caaarmex S.A. de C.V.
Servicios Ejecutivos Linde, S.A. de C.V.
Sociedade Portuguesa de Oxigenio Ltda.
Societa Macchine Impianti S.p.A.
Techno B N.V.
Tenngasco Gas Gathering Company
Trattamento Rifiuti Industriali S.r.l.
Union Gas Company Limited
Wellnite Services
Wetmore Welding Supplies Limited
White Martins Administracao, Investimentos e Fomento Comercial Ltda.

White Martins Gases Industriais do Nordeste S.A.
White Martins Gases Industriais do Norte S.A.
White Martins Gases Industriais S.A.
White Martins Soldagem Ltda.
White Martins Trading S.A.

Table of Contents.

Page

DECISIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE 4

Nature of the Action 4

Section (b)(3) of the NRA 5

History of Low Cost Power At Project 16 6

Events Leading to Passage of the NRA..... 7

The FPC License 9

1961-1989 Replacement Power Rates 10

Rate Increases 1990-1992 10

Table of Contents.
(Continued)

Page

The District Court Decision 11

The Court of Appeals Decision 12

ARGUMENT:

POINT I The Plain Language of Section (b)(3) Requires that Replacement Power be Priced as Closely as Possible to the Three Mills per kWh Project 16 Rate 13

Establishing a Class of Beneficiaries: "Industries" 14

"Restore" 15

"Low Power Costs" 15

"As Nearly As Possible" 16

The Plain Language as a Whole 16

POINT II The Decisions Below Destroy the Single Distinguishing Feature of Replacement Power Created by Congress 23

CONCLUSION 24

Table of Contents to Appendix.

Page

A. Order of the United States Court of Appeals for the Second Circuit, Filed June 7, 1993, Denying Petition for Rehearing 1a

B. Opinion of the United States Court of Appeals for the Second Circuit, Decided April 12, 1993..... 3a

C. Opinion of the United States District Court, Western District of New York, Dated March 11, 1992 . 11a

D. Opinion of the United States District Court, Western District of New York, Dated March 15, 1991 . 49a

E. 16 U.S.C. § 836—Niagara Redevelopment Act ... 65a

F. Letter From PASNY Chairman Robert Moses to Welles V. Moot, Counsel for the Basic Industries Power Committee (January 4, 1957) 68a

G. Letter From Robert Moses, Chairman of PASNY, to Nelson A. Rockefeller, New York State Governor (January 10, 1961) 70a

H. Excerpt From *PASNY Official Statement (Series F Bonds)* (January 5, 1959) 76a

Table of Authorities.

Page

CASES:

Bluefield Water Works v. Public Service Comm'n, 262 U.S. 679 (1923) 16

Demarest v. Manspeaker, 498 U.S. 184 (1991) 13

Falcon Dam Constructors v. United States, 142 F. Supp. 902 (Ct. Cl. 1956) 22

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), *reh'g denied*, 362 U.S. 956 (1960)..... 8, 19

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 13

Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980)..... 20

Metropolitan Transp. Authority v. Federal Energy Regulatory Comm'n, 796 F.2d 584 (2d Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) 17

Morales v. Trans World Airlines, 504 U.S. ____, 112 S. Ct. 2031 (1992) 13

Table of Authorities.
(Continued)

Page

Occidental Chem. Corp. v. Power Auth. of N.Y., 758 F. Supp. 854 (W.D.N.Y. 1991)..... 5, 6

Occidental Chem. Corp. v. Power Auth. of N.Y., 786 F. Supp. 316 (W.D.N.Y. 1992)..... *passim*

Occidental Chem. Corp. v. Power Auth. of N.Y., 990 F. 2d 726 (2d Cir. 1993)..... *passim*

Perrin v. United States, 444 U.S. 37, 42 (1979), *cert. denied*, 444 U.S. 956 (1979)..... 14

Power Auth. of N.Y. v. Federal Energy Regulatory Comm'n, 743 F.2d 93 (2d Cir. 1984)..... 23

Redmon v. United States, 471 F.2d 687 (6th Cir. 1972) 15

Thompson/Ctr. Arms Co. v. United States, 924 F.2d 1041 (D.C. Cir. 1991) 15

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 13

United States v. Ramos, 961 F.2d 1003 (1st Cir. 1992) 15

Table of Authorities.
(Continued)

Page

Weaver v. Reagen, 886 F.2d 194, *reh'g denied*, 1989 U.S. App. LEXIS 16825 (8th Cir. 1989) (en banc) 20

West Virginia Univ. Hosps, Inc. v. *Casey*, 499 U.S. 83 (1991) 13

STATUTES:

FEDERAL

28 U.S.C. § 1254(1)..... 3

Falcon Dam on the Rio Grande Act, Pub. L. No. 406, ch. 310, 68 Stat. 255 (1954)..... 22

Flood Control Act of 1944, § 5 22

Niagara Redevelopment Act, U.S.C. § 836 (1985).. *passim*

STATE

N. Y. Pub. Auth. Law § 1001 (McKinney 1982) 4

N. Y. Pub. Auth. Law § 1002 (McKinney 1982) 4

N. Y. Pub. Auth. Law §1012 (McKinney 1982)..... 11

Table of Authorities.
(Continued)

Page

OTHER AUTHORITIES:

Development of Power at Niagara Falls, N.Y.: Hearings on S. 512 and S. 1037 Before a Subcomm. of the Senate Comm. on Public Works, 85th Cong., 1st Sess. (April 10-13, 1957)..... 9, 10, 11, 22

Niagara Power: Hearings on H.R. 142, H.R. 420, H.R. 5377, H.R. 5706, and H.R. 5878 Before the House Comm. on Public Works, 84th Cong., 1st Sess. (June 8-10, 1955)..... 8, 10

S. Rep. No. 539, 85th Cong., 1st Sess. (1957)..... 8, 15

S. Rep. No. 1030, 78th Cong., 2d Sess. 3 (1944) 22

House Rep. No. 862, 85th Cong., 1st Sess. (1957) ... 9

103 Cong. Rec. 14437, 14438-39 (1957) 9

American Heritage Dictionary (Houghton Mifflin Co., 1985) 15

Webster's Third New International Dictionary 1936 (17th ed. 1976)..... 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., AND UNION CARBIDE CORPORATION,

Petitioners,

against

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners General Mills, Inc., Bethlehem Steel Corporation, Nabisco Brands, Inc. and Union Carbide Corporation respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the

Second Circuit affirming the decision of the United States District Court for the Western District of New York (John T. Curtin, J.), dated April 14, 1992, in this case.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit denying petitioners' Petition for Rehearing and Rehearing In Banc is unreported. A copy is set forth in Appendix "A".

The decision of the United States Court of Appeals for the Second Circuit affirming the decision of the United States District Court for the Western District of New York is reported at 990 F.2d 726 (2d Cir. 1993). A copy is set forth in Appendix "B".

The decision of the United States District Court for the Western District of New York granting respondent's motion for summary judgment and dismissing the complaints filed in this case is reported at 786 F. Supp. 316 (W.D.N.Y. 1992). A copy is set forth in Appendix "C".

The decision of the United States District Court for the Western District of New York denying respondent's motion to dismiss the complaints filed in this case pursuant to Fed. R. Civ. P. 12(b) is reported at 758 F. Supp. 854 (W.D.N.Y. 1991). A copy is set forth in Appendix "D".

JURISDICTION

Petitioners General Mills, Inc., Bethlehem Steel Corporation, Nabisco Brands, Inc. and Union Carbide Corporation respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit ("Court of Appeals") affirming the decision of the United States District Court for the Western District of New York ("District Court") (John T. Curtin, J.), dated April 14, 1992, in this case.

The order of the United States Court of Appeals for the Second Circuit affirming the decision of the District Court was entered on April 12, 1993. Petitioners' motion for a rehearing and rehearing in banc was denied pursuant to an order entered on June 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory provision involved, Section (b)(3) of the Niagara Redevelopment Act, 16 U.S.C. § 836(b)(3) (1985), is set forth in Appendix "E".

STATEMENT OF THE CASE

Nature of the Action

Replacement Power, which is a unique category of electricity[1] generated by respondent Power Authority of the State of New York ("PASNY"), was created by federal statute, the Niagara Redevelopment Act ("NRA"), 16 U.S.C. §§ 836, 836a, for sale to a specific group of customers— "industries which purchased power produced by project 16" prior to the destruction of Project 16[2] on June 7, 1956—for a specific purpose— "in order as nearly as possible to restore low power costs to such industries." 16 U.S.C. § 836(b)(3). The NRA directed the Federal Power Commission ("FPC"), predecessor to the Federal Energy Regulatory Commission ("FERC"), to issue a license to PASNY to construct a hydroelectric power project ("Niagara Project") using the entire United States share of the Niagara River water flow. 16 U.S.C. § 836(a). Replacement Power is the only category of Niagara Project power reserved exclusively for industrial customers by the NRA.

Petitioners are industries which purchased power produced by Project 16 prior to its destruction and currently

[1]Replacement Power is physically the same as other sixty cycle electricity generated in the United States. The single quality which distinguishes Replacement Power from most electric power generated in the United States is price.

[2]Project 16 was comprised of two hydroelectric plants owned and operated by Niagara Mohawk Power Corporation. It was so named because the license to operate the project was the sixteenth license issued by the Federal Power Commission. *See infra*, pp. 6-7.

purchase Replacement Power from PASNY's Niagara Project. Respondent PASNY is a not-for-profit public authority of the State of New York which was established in 1931 to create and develop facilities for the generation and sale of hydroelectric power using the water flow of the St. Lawrence River. *See* N.Y. Pub. Auth. Law §§ 1001, 1002 (McKinney 1982). In 1951, PASNY was further authorized to develop a hydroelectric facility using the Niagara River water flow. *Id.* The petitioners' amended complaint in this action alleges, *inter alia*, that PASNY violated Section (b)(3) of the NRA (hereinafter "Section (b)(3)"), 16 U.S.C. § 836(b)(3), when PASNY's Trustees approved a price increase for Replacement Power on December 21, 1989. *See Occidental Chem. Corp.* v. *Power Auth. of N.Y.*, 758 F. Supp. 854, 855 (W.D.N.Y. 1991)(hereinafter "*Occidental I*") (App. at 50a-51a.)[3] The increase violates the NRA's mandate that the 445,000 kilowatts of Replacement Power be sold to a specific group of industries, including the petitioners, in order to restore to those industries, as nearly as possible, the low cost power of Project 16.

Section (b)(3) of the NRA

Section (b)(3) of the NRA provides, in relevant part, that PASNY "shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law to sell to [Niagara Mohawk Power Corporation ("Niagara Mohawk")], for a period ending not later than the final maturity date of the bonds initially issued to finance" the Niagara Project (the year 2006), 445,000 kilowatts of electric power:

[3]The reference is to the pages in the appendices to this petition, as are all similar references hereafter.

> for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, *in order as nearly as possible to restore low power costs to such industries* and for the same general purposes for which power from project 16 was utilized.. . .

16 U.S.C. §836(b)(3) (emphasis added). This power is referred to as "Replacement Power" because it replaced power previously supplied by Niagara Mohawk's Project 16. *Occidental I*, 758 F. Supp. at 856 (App. at 53a.)

History of Low Cost Power At Project 16

Prior to June 7, 1956, Niagara Mohawk, or its predecessor, Niagara Falls Power Company ("NFPC"), operated two hydroelectric generating facilities, the Adams (80,000 kw capacity) and Schoellkopf (365,000 kw capacity) stations. *Occidental Chem. Corp.* v. *Power Auth. of N.Y.*, 786 F. Supp. 316, 318 (W.D.N.Y. 1992) (hereinafter "*Occidental II*") (App. at 13a.) These generating plants were known jointly as Project 16. *Id.* (App. at 14a.) Prior to June 7, 1956, a number of industries, including the petitioners, purchased low cost hydroelectric power generated by Project 16. *Id.* at 319 (App. at 15a.)

The price of hydroelectric power generated by Project 16 was regulated by the State of New York Public Service Commission (hereinafter "PSC"). *Id.* NFPC filed its first hydroelectric rate tariff in 1915. *Id.* The hydroelectric power was sold by NFPC and Niagara Mohawk to industrial consumers of electric power located in the Niagara Falls

region at an average rate of 3-mills ($0.003) per kilowatt-thour ("kWh"). *Id.* (App. at 15a-16a.)

While Niagara Mohawk's 3-mill rate included a rate of return on capital, *id.* at 327 n.16 (App. 34a-35), and Niagara Mohawk was entitled to seek rate increases, it could only do so under its PSC-approved tariffs if either costs or capital expenditures increased. *Id.* at 327 n.17 (App. at 35a.) Project 16's expenses and capital costs remained stable for 40 years and Niagara Mohawk did not seek a rate increase. *See id.* Thus, the 3-mill rate remained in effect from 1915 until a rockslide substantially destroyed the Schoellkopf station on June 7, 1956. *Id.* at 323-324 (App. at 26a.)

Events Leading to Passage of the NRA

In 1950, the United States and Canada entered into a treaty providing, *inter alia*, for diversion by the United States of additional water flow from the Niagara River for the production of hydroelectric power in excess of that which could be utilized by Niagara Mohawk's Project 16. *Occidental II*, 786 F. Supp. at 318 (App. at 14a.) In ratifying the treaty, the Senate attached a provision subjecting to Congressional approval the means of developing the additional water flow for power generation and the uses of the power. *Id.*

Congress considered legislation to authorize hydroelectric development of the Niagara River over each session of Congress from 1951 through 1956, but was unable to reach agreement. One of the issues debated was whether a for-profit private utility (Niagara Mohawk), or a non-profit public body (PASNY), should be authorized to develop the

additional water flow. *Id.* at 318-319 (App. at 15a.) Niagara Mohawk was a vociferous advocate of private development. *Id.* PASNY argued that it was better suited to develop public resources because, *inter alia*, it, as opposed to Niagara Mohawk, was a non-profit institution which "is not allowed to make any profit whatever." *Niagara Power: Hearings on H.R. 142, H.R. 420, H.R. 5377, H.R. 5706, and H.R. 5878 Before the House Comm. on Public Works*, 84th Cong., 1st Sess. (June 8-10, 1955) (hereinafter "1955 House Hearings") at 157. "Serious disagreement" over the public/private development issue was one of the issues that stalled the legislation. *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 102 (1960), *reh'g denied*, 362 U.S. 956 (1960).

The congressional stalemate was not resolved until after a rockslide destroyed part of Project 16 on June 7, 1956. *Occidental II*, 786 F. Supp. at 319 (App. at 15a-16a.) The industry that had been purchasing the low cost 3-mill power from Project 16 was deprived of that power by the rockslide. *Id.* (App. at 15a.) The lost power quickly was replaced with power from Canada, but at a significantly higher cost. Thus, the need of industry—and the focus of the Replacement Power provisions of the NRA—was not power itself, but low cost power, the low 3-mill rate being the distinguishing feature of Project 16 power. *See, e.g.*, S. Rep. No. 539, 85th Cong., 1st Sess. (1957). These facts are not in dispute.

The power crisis facing the industries that had been purchasing Project 16 power led to a compromise between Niagara Mohawk and PASNY. *Occidental II*, 786 F. Supp. at 320-321 (App. at 19a.) The compromise was adopted by Congress and became the Replacement Power provisions of

the NRA.[4] *Id.* at 321 (App. at 20a.) It is clear that Congress understood that the parties had reached an agreement which was reflected in the legislation. *See, e.g.*, 103 Cong. Rec. 14437, 14438-39 (1957) (statements of Sen. Chavez and Sen. Ives); 1957 Sen. Hearings at 14 (statement of Sen. Ives). As the District Court below recognized, Section (b)(3) "did not originate in Congress," but "stemmed from an accommodation between Niagara Mohawk and PASNY reached after the June 7, 1956, rockslide. . . ." *Occidental II*, 786 F. Supp. at 320 (App. at 19a.)

The compromise—Section (b)(3)—contains repeated references to Project 16 and clearly indicates a legislative focus on an historical benchmark rate (*i.e.*, the 3-mill rate of Project 16). The statutory mandate of Section (b)(3), that this historical benchmark rate be restored to Project 16 industries as nearly as possible, can only be fulfilled by cost-based rates for Replacement Power.

The FPC License

Pursuant to the NRA, PASNY applied to the FPC for a license to construct and operate the Niagara Project and, in 1957, received a license for a fifty (50) year term. *Occidental II*, 786 F. Supp. at 321 (App. at 20a.) The license incorporated verbatim the language from Section (b)(3) of

[4]Only the Senate held hearings on the compromise bill in the 85th Congress. *Development of Power at Niagara Falls, N.Y.: Hearings on S. 512 and S. 1037 Before a Subcomm. of the Senate Comm. on Public Works*, 85th Cong., 1st Sess. (April 10-13, 1957) (hereinafter "1957 Sen. Hearings"). The House relied upon the Senate hearings and its own prior hearings. House Rep. No. 862, 85th Cong., 1st Sess. (1957); *see also Occidental II*, 786 F. Supp. at 325 n.14 (App. at 30a-31a.)

the NRA mandating that PASNY "as nearly as possible restore low power costs" to industries in the Niagara Region. *Id.*

1961-1989 Replacement Power Rates

In 1961, PASNY set rates for Replacement Power, as well as rates for all other Niagara Project power, by reference to the cost of operation, maintenance, and debt service at its only other project, the recently completed St. Lawrence hydroelectric project, because it viewed the costs of the two projects as equivalent. For twenty-eight years thereafter (from 1961 through 1989), Replacement Power rates did not change. *Id.* (App. at 21a.) In statements to Congress, the FPC, prospective bondholders, industries slated to receive Replacement Power, Niagara Mohawk, Governor Rockefeller, and others, PASNY represented that it was a non-profit organization, that it intended to sell Niagara Project power at its cost of production, and that rate reductions, not rate increases, were likely in the future because the costs of the Niagara Project would decline over time as debt was retired. 1957 Sen. Hearings at 175; 1955 House Hearings at 147, 165 (*See also* App. at 68a, 72a, 76a.)

Rate Increases 1990-1992

In late 1989, the PASNY Trustees approved rate increases for Replacement Power for 1990 and 1991, stating for the first time that rate levels need not be limited to recovering the cost of service and could be raised to generate additional revenues which could be used for purposes unrelated to the Niagara Project. *Occidental II*, 786 F. Supp. at 321-322 (App. at 21a-22a.) PASNY contended that it could increase

Replacement Power rates to generate excess revenues at the Niagara Project to subsidize other PASNY projects which PASNY was not even authorized to construct at the time of the enactment of the NRA.[5] In 1991, PASNY's Trustees approved additional rate increases for 1992. *Occidental II*, 786 F. Supp. at 322 (App. at 22a.)

The District Court Decision

On cross-motions for summary judgment, the District Court held that Section (b)(3) did not establish a cost-based rate standard for Replacement Power, but it failed to articulate any meaningful alternative rate standard. *Id.* at 328 (App. at 38a.) At various points in its opinion, the District Court inconsistently suggested that: (1) Section (b)(3) did not establish any rate standard whatsoever, *id.* at 332-33 (App. at 47a-48a); (2) that PASNY fulfilled its statutory obligation to "restore" low cost power to industry in the Niagara region by setting initial cost-based rates in 1961 and was subject to no standard thereafter, *id.* at 328,

[5]Congress could not have contemplated that rates for Replacement Power would be set so as to generate revenues to subsidize these other more costly projects. PASNY represented to Congress that it only had two functions -- to build the Niagara Project and the St. Lawrence Project. 1957 Sen. Hearings at 175. Following enactment of the NRA, the scope of PASNY's powers was expanded to authorize it to develop additional projects, including nuclear generating facilities and oil and gas-fired plants, all of which are more costly to operate than hydroelectric facilities. As of the end of 1990, nine PASNY projects were operational in addition to the Niagara and St. Lawrence hydroelectric facilities. Section 1012 of the New York Public Authorities Law provides that each PASNY project must be self-supporting. The petitioners also challenged the Replacement Power rate increase in pendent claims based on the state law.

331-332, n.28; and (3) the statutory obligation to restore low cost power is measured by reference to the current market price of power rather than to PASNY's costs as the seller, and, from such a perspective, low cost power is restored because, even with the rate increases, Replacement Power is priced below current market power prices. *Id.* at 330 (App. at 42a-43a.) None of these interpretations is consistent with the language of Section (b)(3) of the NRA or protects the benefit created by Congress for the Project 16 industries. The District Court interpreted Section (b)(3) as a grant of virtually unfettered discretion by Congress to a State authority.

The Court of Appeals Decision

The Court of Appeals affirmed the District Court's holding, specifically referencing "[t]he importance of the case." *Occidental Chem. Corp.* v. *Power Auth. of N.Y.*, 990 F. 2d 726, 727 (2d Cir. 1993) (hereinafter "*Occidental III*"). Although the Court of Appeals found that ". . . the phrase 'restore low power costs' refers to the pre-1956 three-mill rate charged by Niagara Mohawk," the Court of Appeals accepted one of the District Court's interpretations of Section (b)(3)—that the statutory obligation to "as nearly as possible to restore low power costs" is satisfied by reference to the current industrial rates of other utilities. *Id.* at 728 (App. at 9a-10a.)

ARGUMENT

POINT I

The Plain Language of Section (b)(3) Requires that Replacement Power be Priced as Closely as Possible to the Three Mills per kWh Project 16 Rate

In this case, as in every case involving statutory construction, the analytical starting point is the language employed by Congress in the statute. *Demarest* v. *Manspeaker*, 498 U.S. 184, 187 (1991). Where the question is one of statutory intent, the Court must begin its analysis with the language employed by Congress in the statute and the "assumption that the ordinary meaning of that language accurately expresses the legislative purpose". *Morales* v. *Trans World Airlines*, 504 U.S. ____, 112 S. Ct. 2031, 2036 (1992) (citing *FMC Corp.* v. *Holliday*, 498 U.S. 52 [1990].)

Once the ordinary meaning is found in its textual context, the Court will use established canons of statutory construction to determine whether there is any clear indication that some permissible meaning other than the ordinary meaning applies. If not, and especially if a good reason for the ordinary meaning appears plain, the Court will apply the ordinary meaning. *West Virginia Univ. Hosps, Inc.* v. *Casey*, 499 U.S. 83 (1991). Where the statute's language is plain, "the sole function of the court is to enforce it according to its terms." *See United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Caminetti* v. *United States*, 242 U.S. 470, 485 [1917].)

In Section (b)(3) of the NRA, Congress mandated that Replacement Power be sold to industries that had received Project 16 power prior to the rockslide "in order as nearly as possible to restore low power costs to such industries". 16 U.S.C. § 836(b)(3). It is the meaning of this statutory mandate that is at issue. In order to determine the "ordinary meaning" of the statute, it is necessary to interpret individual words in the statute in accordance with their ordinary meaning as part of any statutory exegesis. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979), *cert. denied*, 444 U.S. 956 (1979).

Establishing a Class of Beneficiaries: "Industries"

Section (b)(3) identifies a specific class of beneficiaries for Replacement Power in that it makes specific reference to resale of Replacement Power to "industries which purchased power produced by Project 16 . . . or their successors. . . ." In fact, the District Court acknowledged that Congress, in directing that Replacement Power be sold "in order as nearly as possible to restore low power costs to such industries," was referring to restoring the low cost hydroelectric power from Project 16 that was available to the Project 16 industrial consumers for decades. *Occidental II*, 786 F. Supp. at 320 (App. at 18a.) As the District Court found, "[t]he loss of this power from the Niagara region was potentially devastating to the industries that had located in the region to take advantage of low-cost hydroelectric power." *Id.* at 319 (App. at 15a.)

"Restore"

The ordinary meaning of the word "restore" is to put back in a pre-existing condition. *United States* v. *Ramos*, 961 F.2d 1003, 1008 (1st Cir. 1992), *Thompson/Ctr. Arms Co.* v. *United States*, 924 F.2d 1041, 1043 (D.C. Cir. 1991) (citing *Webster's Third New International Dictionary* 1936 (17th ed. 1976)), or "to give back (as something lost or taken away)", *Redmon* v. *United States*, 471 F.2d 687, 689 (6th Cir. 1972). "Restore" is defined in the *American Heritage Dictionary* (Houghton Mifflin Co., 1985) as "to bring back into existence or use; reestablish; to bring back to an original condition; to put back in a prior position; to . . . give back." Congress intended to "restore" the pre-existing historical low cost power (the 3-mill rate) "as nearly as possible" for industries that had been receiving Project 16 power. "Restore" was meant to bring back into existence, as nearly as possible, the 3-mill low cost power.

"Low Power Costs"

The reference to Project 16 eight times in Section (b)(3) of the NRA makes it unmistakably clear that the lodestar for Replacement Power rates was to be the antecedent low cost Project 16 power.[6] There also is no dispute that "low power costs" referred to the 3-mill rate charged for the Project 16 power which had been lost. *See Occidental II*, 786 F. Supp. at 323-324 (App. at 26a-27a.)

[6]The Senate Report accompanying S. 2406, which bill was enacted as the NRA, similarly makes clear that the low cost power sought to be restored was Project 16 hydroelectric power. *See* S. Rep. No. 539, 85th Cong., 1st Sess. (1957).

"As Nearly As Possible"

The meaning of the phrase "as nearly as possible" is evident from the language and the context in which the statute was enacted. It means, in ordinary language, to come as close as can be achieved, an interpretation apparently accepted by the District Court. *See Occidental II*, 786 F. Supp. at 325 (App. at 29a.) Congress recognized that the cost to construct the Niagara Project would result in cost-based power priced at more than the Project 16 3-mill rate. *Id.* at 325 n.13. Realizing that the 3-mill rate could not be duplicated because construction costs had increased since Project 16 was built, Congress called for PASNY to restore low power costs "as nearly as possible. . . ."[7]

The Plain Language as a Whole

The plain language of the statute expresses a legislative intent to reestablish the Project 16 low power cost of 3 mills for the benefit of Project 16 industries, tempered with the recognition that due to the construction costs and debt service of the Niagara Project, PASNY could not replicate the 3-mill rate. The statutory language unambiguously indicates that the Congressional intent was to require PASNY to establish a price as close as possible to the 3-mill rate.

The Court of Appeals understood correctly that the term "restore" as used in Section (b)(3) of the NRA refers to the

[7]A statutory requirement that rates be set at the 3-mill level may have been subject to a challenge as unconstitutionally confiscatory given the passage of time between the construction of Project 16 and the projected completion date of the Niagara Project. See *Bluefield Water Works* v. *Public Service Comm'n*, 262 U.S. 679, 690 (1923).

3-mill rate charged for Project 16 power: "the phrase 'restore lower power costs' refers to the pre-1956 3-mill rate charged by Niagara Mohawk to the industries." *Occidental III*, 990 F.2d at 727 (App. at 7a.) Notwithstanding that recognition, the Court of Appeals held that Replacement Power could be sold at a rate which has no relationship, direct or indirect, to the cost to industry of power from Project 16. *Id.* The resulting standard, if any standard exists, has no link to the pre-1956 3-mill rate charged by Niagara Mohawk for power from Project 16.

Consequently, the plain statutory mandate to approximate the Project 16 3-mill rate cannot be reconciled with the District Court's holdings, affirmed by the Court of Appeals, that "the NRA does not mandate a cost-based rate for Replacement Power," *Occidental II*, 786 F. Supp. at 331 (App. at 43a), or that the statute had been satisfied solely because, when compared to other current industrial rates, Replacement Power is inexpensive. *Id.* at 330 (App. at 42a-43a.)

The District Court's rationale in the instant case , and the Court of Appeals' adoption thereof, is in marked contrast to the Court of Appeals' reasoning in *Metropolitan Transp. Authority* v. *Federal Energy Regulatory Comm'n*, 796 F.2d 584, 593 (2d Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) in which the Court rejected an argument that it should ignore Congressional intent with respect to the NRA based on ". . . the disparity [today] between the low cost of hydropower and the higher cost of *privately-produced* power. . . ." In reviewing Section (b)(1) of the NRA, 16 U.S.C. § 836(b)(1), in *Metropolitan Transp. Authority*, 796 F.2d at 593, the Court of Appeals stated that, notwithstand-

ing that disparity in costs, "it is not for FERC or ourselves to second-guess [Congress'] basic determination".

It cannot be overemphasized that Section (b)(3) contains no reference to Niagara Mohawk power other than the antecedent Project 16 power, to hydroelectric power in general or other industrial power sold in other parts of the country. To the contrary, the only reference in the statute is to restoring, "as nearly as possible," the low cost Project 16 power which was sold at a uniform rate to industries located in the Niagara Falls area. It is beyond cavil that the 3-mill Project 16 rate was not based on industrial rates charged by other utilities. Thus, it is necessary to reject the District Court's finding, which was affirmed by the Court of Appeals, that other industrial rates are a permissible reference point for determining the rate for Replacement Power.

Absent a statutory reference to the costs of other power sources, and in light of the specific statutory reference to Project 16 power costs, an interpretation that refuses to acknowledge a rate standard or relies on a comparison to other current sources of industrial power renders the statutory language a nullity and destroys the distinguishing feature of Replacement Power—its historically based cost that originally was set as close to the 3-mill Project 16 lodestar as was possible.

Nor does the plain language of the NRA support the District Court's finding, which was cited by the Court of Appeals with approval, that the obligation to restore low power costs "as nearly as possible" was not for the entire period of time that Replacement Power exists. *Occidental III*, 990 F.2d at 727 (App. at 6a.) Section (b)(3), to the

contrary, mandates that Replacement Power be available at low cost on a long-term basis by specifying the final maturity date of the bonds initially issued to finance the project as the end point of the obligation of Section (b)(3). 16 U.S.C. § 836(b)(3). Indeed, the suggestion that PASNY could have set cost-based rates in 1961, the year the Niagara Project was completed, only to raise such rates above their cost a year (or even a day) later, *see* e.g. *Occidental II*, 786 F. Supp. at 331 n.28 (App. at 45a), is a conclusion that is not supported by either the plain language of the statute or common sense. There is nothing in the text of the statute that suggests that PASNY does not have an obligation to restore low power costs "as nearly as possible" to the Project 16 industries for the entire period over which Replacement Power was to be sold.[8]

Indeed, PASNY and Niagara Mohawk contracted to make Replacement Power available for resale to industrial customers through 2006. The period of time for which the cost is "restored" must be coterminous with the term of availability. The fact that PASNY and Niagara Mohawk had discretion to agree to a contract term less than the term of the project bonds and the fact that, by statute, Replacement Power will terminate in 2006, is irrelevant. Once PASNY exercised the choice of selling Replacement Power to Niagara Mohawk until 2006, it must then sell the power at rates consistent with the statutory mandate.

[8]In *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. at 105 n.8, this Court found that "Niagara Mohawk Power Corporation was given the right to purchase 445,000 kilowatts *for a designated period* to supply, and 'restore low power costs to,' the customers of its Schoellkopf plant [Project 16]..." (emphasis supplied.)

As early as 1951, PASNY pursued Congressional authorization to build a new hydroelectric project in Niagara Falls. In 1957, the NRA provided PASNY with this long sought-after right. Where an entity chooses to participate in federal programs to obtain the benefits thereof, even if it chooses to offer service options beyond those required, "it is bound to act in compliance with the Act and the applicable regulations in the implementation of those services." *Weaver v. Reagen*, 886 F.2d 194, 197, *reh'g denied*, 1989 U.S. App. LEXIS 16825 (8th Cir. 1989) (en banc); *Harris v. McRae*, 448 U.S. 297, 301, *reh'g denied*, 448 U.S. 917 (1980). ("Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.") Although PASNY was not required to offer Replacement Power through the year 2006, having done so, it is bound to do so within the terms of Section 836(b)(3).[9]

Despite the clarity of the language used by Congress to express the commitment that industrial consumers that had received Project 16 3-mill power would, as nearly as possible, have that power cost restored, concern was expressed by both the District Court, *Occidental II*, 786 F. Supp. at 326-27 (App. at 32a-34a), and the Court of Appeals, *Occidental III*, 990 F.2d at 727 (App. at 7a), that Congress did

[9]A cost-based standard, contrary to the District Court's conclusion, does not require "that the rates for Replacement Power be fixed at their 1961 level ...indefinitely into the future." *See Occidental II*, 786 F. Supp. at 328 (App. at 38a.) Rather, a cost-based rate enacted pursuant to the NRA's mandate to "restore as nearly as possible" the Project 16 3-mill rate accommodates changes in rates based upon changes in costs. In fact, PASNY initially represented that rates would decrease as debt service costs declined (App. at 76a.)

not employ, in the Replacement Power provisions of the NRA, language identical to that employed in other statutes requiring cost-based rates. The answer to this concern is that, unlike those other statutes, the purpose of the Replacement Power provisions was to restore prior power costs "as nearly as possible."

If costs fall below 3 mills, petitioners do not contend that a cost-based rate is required by the NRA. The statutory standard requires that the rate be "as nearly as possible" 3 mills. If costs fall below 3 mills, the rate would be 3 mills, not cost. Thus, Congress did not say "at cost" or "cost-based" or "rates based on 'cost'" because it did not intend to require a cost-based rate in all circumstances. Instead, the 3-mill rate is the lower limit at which the cost-based standard no longer applies.[10] Congress said exactly what it meant. When costs exceed 3 mills, as PASNY contends, only a cost-based rate can fulfill the statutory language to restore as nearly as possible the 3-mill rate. The Court of Appeals, however, focused on the lack of the words "at cost" and ignored the statutory language that precisely prescribes the applicable standard.

Moreover, the Project 16 replacement situation was unique because there existed a previous rate standard. This situation did not apply to other classes of power to be

[10]The Court of Appeals' finding that the 3-mill rate contained a profit, *Occidental III*, 990 F.2d at 727 (App. at 7a), does not support its rejection of a cost-based rate where costs exceed 3 mills. PASNY also could charge more than its costs, if like Niagara Mohawk's, its costs were less than 3 mills. Such a result is conceivable because the Niagara Project was funded entirely by bonded debt which has long since been repaid and its fuel costs (*i.e.*, water) essentially are zero.

produced by the Niagara Project or to other federal power projects in other areas. For example, Section 5 of the Flood Control Act of 1944 and the Falcon Dam on the Rio Grande Act, Pub. L. No. 406, ch. 310, 68 Stat. 255 (1954), cited by the District Court, *Occidental II*, 786 F. Supp. at 326 (App. at 32a), established the rate standard for power to be produced at new projects lacking a prior rate standard. *See* S. Rep. No. 1030, 78th Cong., 2d Sess. 3 (1944); *Falcon Dam Constructors* v. *United States*, 142 F. Supp. 902, 903-04 (Ct. Cl. 1956) (describing planning and construction of Falcon Dam project pursuant to 1944 Treaty.) In the absence of a historical benchmark, such as the 3-mill Project 16 power, the choice of different language in these other statutes is understandable.

Congress, intended, as it stated in the NRA and as found by the Court of Appeals, *Occidental III*, 990 F.2d. at 727 (App. at 7a), to "restore" the 3-mill rate, "as nearly as possible." Congress had been informed that PASNY could not replicate the 3-mill rate and recapture its costs, including construction costs. 1957 Sen. Hearings at 180, 187, 228. Congress did not use the phrase "at cost" because Congress did not intend cost-based rates if power production costs fell below the historical benchmark rate of 3 mills. Congress chose language that expressed its intended meaning precisely. Cost-based rates for Replacement Power come closest to replicating the Project 16 rate, while allowing PASNY to recover the costs incurred in the construction of the Niagara Project.

POINT II

The Decisions Below Destroy the Single Distinguishing Feature of Replacement Power Created by Congress

The sole characteristic that distinguishes Replacement Power from other electric power available to the petitioners is its price. The Court of Appeals appears to have authorized PASNY to establish any rate it wishes for Replacement Power if that rate is competitive with other sources of electric power available in the United States. *Occidental III*, 990 F.2d at 728 (App. at 9a-10a.) Thus, the decisions below accord Replacement Power no more price protection than is available generally in competitive markets or through regulation designed to simulate competition.

This result cannot be reconciled with the fact that section (b)(3) of the NRA was enacted by Congress for the express purpose of conferring an economic benefit on those industries that had been purchasing the low cost power from Project 16 before the rockslide. In fact, this statutory plan, inherent in the NRA, generally was acknowledged by the Court of Appeals in a prior case where the Court concluded that in enacting the NRA, Congress was "mainly concerned" with "the needs of industry." *Power Auth. of N.Y.* v. *Federal Energy Regulatory Comm'n*, 743 F.2d 93, 105 (2d Cir. 1984).

Any interpretation of the Replacement Power provisions of the NRA that ignores the uncontestable fact that Congress intended to confer an economic benefit on Replacement Power recipients (as opposed to the non-profit entity PASNY) must be rejected as contrary to the statutory plan

set out in the statute. The decisions below do not effectuate this clear statutory plan.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 7th day of September, 1993.

ALGIRD F. WHITE, JR., ESQ.*
BARBARA S. BRENNER, ESQ.
COUCH, WHITE, BRENNER,
HOWARD & FEIGENBAUM
540 Broadway, P.O. Box 22222
Albany, New York 12201-2222
(518) 426-4600

Attorneys for Petitioners General Mills, Inc., Bethlehem Steel Corporation, Nabisco Brands, Inc., and Union Carbide Corporation

*Counsel of Record

APPENDIX.

APPENDIX A—Order of the United States Court of Appeals for the Second Circuit, Filed June 7, 1993, Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of June one thousand nine hundred and ninety-three.

OCCIDENTAL CHEMICAL COPRORATION, THE PILLSBURY COMPANY, GENERAL MILLS, INC., BETHLEHEM STEEL COPRORATION, NABISCO BRANDS, INC., UNION CARBIDE CORPORATION,

Plaintiffs-Appellants,

-v-

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendant-Appellee.

DOCKET NUMBER: 92-7526,
92-7528

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by coun-

sel for appellants, Occidental Chemical Corp., Pillsbury Co., General Mills Inc., Bethlehem Steel Corp., Nabisco Brands, Inc., and Union Carbide Corp.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
ELAINE B. GOLDSMITH
Clerk
BY: CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

ALGIRD F. WHITE, ESQ.
COUCH, WHITE, BRENNER
HOWARD & FEIGENBAUM
540 Broadway
P.O. Box 22222
Albany, NY 12201-1222

Filed Jun 7 1993
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

APPENDIX B—Opinion of the United States Court of Appeals for Second Circuit, Decided April 12, 1993.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Nos. 331, 332—August Term, 1992

(Argued October 19, 1992 Decided Apr 12 1993)

Docket Nos. 92-7526,-7528

OCCIDENTAL CHEMICAL CORPORATION, THE PILLSBURY COMPANY, GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., UNION CARBIDE CORPORATION,

Plaintiffs-Appellants,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendant-Appellee.

Before OAKES, NEWMAN and MAHONEY, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Western District of New York, John T.

Curtin, *Judge*, granting a motion for summary judgment and dismissing appellants' complaint seeking declaratory relief from the Power Authority of the State of New York's decision to sell Replacement Power from its Niagara hydroelectric project at a rate greater than its cost of producing that power.

Affirmed.

Earle H. O'Donnell, Washington, DC (John D. Sharer, Steuart H. Thomsen, Nicholas T. Christakos, Sutherland, Asbill & Brennan, of counsel), *for Plaintiff-Appellant Occidental Chemical Corporation.*

(Kevin A. Ricotta, Buffalo, NY (Connors & Vilardo, of counsel)), *for Plaintiff-Appellant The Pillsbury Company.*

Algird F. White, Jr., Albany, NY (Barbara S. Brenner, Couch, White, Brenner, Howard & Feigenbaum, of counsel), *for Plaintiffs-Appellant General Mills, Inc., Bethlehem Steel Corporation, Nabisco Brands, Inc. and Union Carbide Corporation*

Arthur T. Cambouris, New York, NY (Charles M. Pratt, Sarah J. Berger, Ann M. Quigley, Michael A. Oxman; Sharon M. Porcellio, Lippes, Silverstein, Mathias & Wexler, Buffalo, NY, of counsel), *for Defendant-Appellee.*

OAKES, *Circuit Judge*:

On appeal, six Niagara-area customers of the Power Authority of the State of New York ("PASNY") argue that the language, legislative history and purpose of the Niagara Redevelopment Act ("NRA"), 16 U.S.C. §§ 836-836a (1988), require PASNY to sell so-called Replacement Power from the Niagara hydroelectric project to them at a rate equal to PASNY's cost of production. Accordingly, these customers—large, industrial, long-time, low-cost power consumers—argue that the construction of the statute by the District Court for the Western District of New York, John T. Curtin, *Judge*, set forth in an opinion reported at 786 F. Supp. 316 (W.D.N.Y. 1992), is erroneous and that, therefore, the summary judgment granted to PASNY on their complaint for declaratory relief should be reversed. We disagree and affirm.

Judge Curtin's opinion, his grasp of the complex underlying history,[1] his analyses of the statutory phraseology, the legislative give-and-take, and the ideas and aims of the Congressional approach toward development of the enormous, continual hydro flow of the Niagara River, after the United States-Canada boundary water treaty signed in 1950, 1 U.S.T. 694, and after the June 7, 1956 rock slide that destroyed the Niagara Mohawk Power Corporation's ("Niagara Mohawk") 365,000 kw Schoellkopf Station, display a mastery of the subject matter that would warrant in most circumstances, despite our intensive review, an affirmance on his opinion. The importance of the case, coupled with one or two new arguments on appeal—or at least

[1]See, Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 100-05 (1960); *Occidental Chem. Corp. v. Power Auth. of the State of N.Y.*, 758 F. Supp. 854, 856-57 (W.D.N.Y. 1991) (prior order herein).

arguments not completely addressed in the opinion—necessitate, however, a few comments on our part.

Appellants are six industries who have benefited from the third condition to the license issued under the Federal Power Act, 16 U.S.C. § 791a *et seq.* (1988), to PASNY to construct and operate the Niagara River hydroelectric project. That condition required PASNY, with the New York governor's approval, to sell to Niagara Mohawk "for a period ending not later than the final maturity date of the bonds initially issued to finance" the project, 445,000 kw of project power (called "Replacement Power")

> for resale generally to the industries which purchased power produced by [the destroyed project] prior to such date, or their successors, *in order as nearly as possible to restore low power costs to such industries* and for the same general purposes for which power from [the destroyed project] was utilized . . . .

16 U.S.C. § 836(b)(3) (1988) (emphasis added).

As Judge Curtin appropriately pointed out, the "ending not later than" language indicates, first, that when the maturity date on the initial PASNY project bonds is reached, as it will be in 2006, the Replacement Power will no longer exist as such and, second, that PASNY and Niagara Mohawk could have contracted for a shorter time. *Occidental Chem. Corp.*, 786 F. Supp. at 323. Appellants construct their argument for requiring PASNY to sell at cost or, more precisely, at PASNY's cost of production, on the further language of the same statute that the purpose of requiring the sale and resale of Replacement Power was "as nearly as possible to restore low power costs to such industries . . . ." 16

U.S.C. § 836(b)(3) (1988). But as Judge Curtin noted, this reading is "quite contrived." *Occidental Chem. Corp.*, 786 F. Supp. at 325. The words of the statute are "costs *to* such industries," not PASNY's "costs." *Id.* at 326. Thus, the phrase "restore low power costs" refers to the pre-1956 three-mill rate charged by Niagara Mohawk to the industries and not to Niagara Mohawk's cost of producing that power (which was in fact about fifty percent of that rate, *id.* at 327).

As the district court observed, *see Occidental Chem. Corp.*, 786 F. Supp. at 326, Congress in other hydroelectric power statutes has used much more explicit language to indicate that power is to be sold at cost. *See* Falcon Dam on the Rio Grande Act of 1954, 68 Stat. 255 (1954) ("Rate schedules shall be drawn having regard to the recovery . . . of the cost of producing and transmitting such electrical energy."); Flood Control Act of 1944, 16 U.S.C. § 825s (1988) (same). In *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984), we noted that if Congress had wanted to accomplish a specific restriction in the NRA (restricting resale from the municipal utilities to domestic and rural consumers), "it could easily have done so simply by stating" that restriction. *Id.* at 104. The same observation applies here. Congress easily could have specified "at-cost power," or rates based on "cost," had that been its intent.

Appellants' reliance on legislative history equally founders. They especially emphasize the April 11, 1957 statement of PASNY General Counsel Moore, made before a subcommittee of the Senate Committee on Public Works in response to a question by Senator John A. Carroll of Colorado, as follows:

> MR. MOORE: No. Under the law that Senator Javits told you about, that established the power authority [the Power Authority Act] the power authority is mandated to sell power at cost. That is all. We don't make any profit. Nobody makes any profit. And it will continue to be sold as long as we are in business.
> SENATOR CARROLL: That is a very important point. I didn't understand that.

Development of Power at Niagara Falls, N.Y.: Hearings on S. 512 and S. 1037 Before the Subcomm. on Flood Control and Harbors of the Senate Committee on Public Works, 85th Cong., 1st Sess. 175 (April 11, 1957) ("Senate Hearings") (quoted in *Occidental Chem. Corp.*, 786 F. Supp. at 329 n.20). That statement—whatever weight it may be entitled to as a matter of law, a question quite fully explored by Judge Curtin, *id.* at 329—must be read in context. The question calling it forth pertained not to the Niagara power project but to the St. Lawrence power project and referred to the pay-out period of 35 years on the $335 million of bonds issued by PASNY to start *that* project. The question was "[w]hen the pay-out period is over, do the revenues go to the New York State Authority [PASNY]?" Senate Hearings, *supra*, at 175. Judge Curtin quite properly concluded that the statement by General Counsel Moore simply was to differentiate PASNY, a non-profit corporation, from private utility companies that pay a rate of return to investors, and not that power sold by PASNY was to be sold at cost to it. *Occidental Chem. Corp.*, 786 F. Supp. at 329-30 & n.20. This, the judge pointed out, was especially consistent with the fact—conceded by the appellants—that PASNY by law needed not market many other classes of power it sells "at cost," a fact which was well known to General Counsel

Moore. *See* N.Y. Pub. Auth. Law § 1005(5) (McKinney's 1982).

Judge Curtin's accurate treatment of the Moore statement is also supported by the context of the entire April 11, 1957 discussion before the Senate Committee at the time. That discussion related to the so-called federal preference clause, whereby neighboring states within an economic transmission distance (particularly those states' municipal and cooperative, i.e., non-profit, utilities) were given as to St. Lawrence (and ultimately as to Niagara) project power a preference, the terms of which were subject to PASNY-neighboring state negotiation. *See* Senate Hearings, *supra*, at 154-178.

Judge Curtin's conclusions from the statute and the legislative history are compelling. To this court it is clear that

> Congress's main concern in providing low-cost power to industry in the Niagara region was to avoid economic dislocation should such industry be forced to move their operations in search of lower-cost power. This concern has been satisfied. Industry has not moved from the Niagara region because, even with the higher rates so far implemented by PASNY, Replacement Power is still apparently the cheapest firm industrial power in the United States, and by a wide margin. Until Replacement Power rates were increased for the first time in January, 1990, the effects of inflation had steadily diminished the cost to industry of Replacement Power. At the end of 1989, Replacement Power cost industry just thirty-five percent in real terms of what it cost industry in 1961. *See* Item 39, ¶ 61. Meanwhile, other industrial rates charged Niagara area industries continued to

> increase, such that even at the 1992 rate of approximately one cent per kWh, Replacement Power cost less than one-sixth the rate charged to Niagara Mohawk's other industrial customers in the Niagara area.

Occidental Chem. Corp., 786 F. Supp. at 330.

Judge Curtin fully addresses all other arguments raised by appellants.

Accordingly, the judgment is affirmed.

APPENDIX C—Opinion of the United States District Court, Western District of New York, Dated March 11, 1992.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

OCCIDENTAL CHEMICAL CORPORATION; THE PILLSBURY COMPANY; GENERAL MILLS, INC.; BETHLEHEM STEEL CORPORATION; NABISCO BRANDS, INC.; and UNION CARBIDE CORPORATION,

Plaintiffs,

-vs-

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendant.

CIV-90-208C

APPEARANCES:

SUTHERLAND, ASBILL & BRENNAN (EARLE H. O'DONNELL, ESQ., and MICHAEL L. DENGER, ESQ., of Counsel), Washington, D.C., for Plaintiff Occidental Chemical Corporation.

CONNORS & VILARDO (KEVIN A. RICOTTA, ESQ., of Counsel), Buffalo, New York, for Plaintiffs Occidental Chemical Corporation and The Pillsbury Company.

COUCH, WHITE, BRENNER, HOWARD & FEIGENBAUM (ALGIRD F. WHITE, JR., ESQ., of Counsel), Albany, New York, for Plaintiffs General Mills, Inc.; Bethlehem Steel Corporation; Nabisco Brands, Inc.; and Union Carbide Corporation.

CHARLES M. PRATT, ESQ., (ARTHUR T. CAMBOURIS, ESQ., of Counsel), New York, New York, for Defendant Power Authority of the State of New York.

DAMON & MOREY (SHARON M. PORCELLIO, ESQ., of Counsel), Buffalo, New York, for Defendant Power Authority of the State of New York.

BACKGROUND

This case involves a question of statutory construction: Does the Niagara Redevelopment Act ("NRA"), 16 U.S.C. § 836(b)(3), prohibit the Power Authority of the State of New York ("PASNY") from selling Replacement Power from its Niagara hydroelectric project at a rate greater than its cost of producing that power? Plaintiffs seek a declaratory judgment that PASNY's decision to increase its Replacement Power rates beginning on January 1, 1990, is contrary to the NRA. Defendant contends that the NRA does not mandate a cost-based rate for Replacement Power.

FACTS

There are no facts in dispute. Although the court set out the facts in its prior order, *Occidental Chem. Corp. v. Power Auth. of the State of New York*, 758 F. Supp. 854, 856-57 (W.D.N.Y. 1991) ("*OCC v. PASNY*"), given the importance of the issue here, an outline of those facts is again necessary. *See also Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 100-06 (1960) (detailing history surrounding passage of NRA).

Prior to the enactment of the NRA by Congress on August 31, 1957, a private utility—the Niagara Falls Power Company ("NFPC"), predecessor company of the Niagara Mohawk Power Corporation ("Niagara Mohawk")—controlled the hydroelectric power-generating capabilities of the Niagara River. Around the turn of the century, NFPC built two hydroelectric facilities on the Niagara: the Adams Plant and the Schoellkopf Station. The Adams Plant generated approximately 80,000 kilowatts ("kW"), and the Schoellkopf Station generated approximately 365,000 kW. In the beginning, NFPC obtained water flow to support these facilities from grants issued by the New York State legislature. After 1909, however, when Canada and the United States signed the Boundary Waters Treaty, the diversion of water from the Niagara for power generation was governed by international agreement. Then, with the passage in 1920 of the Federal Water Power Act, NFPC was required to obtain a federal license for its Niagara facilities. NFPC obtained a fifty-year license from the Federal Power Commission

("FPC") on March 2, 1921. 1 F.P.C. 16 (Item 43, Exhs. 12-14).[1] As this was the sixteenth license issued by the newly formed FPC, NFPC's twin hydroelectric plants came to be known as Project 16. NFPC was granted additional small allocations of water in 1926 and 1928, *see* Item 43, Exhs. 13-14, and a larger allocation in 1941, after an agreement between the United States and Canada to divert more water for hydroelectric power generation. *See* 2 F.P.C. 461 (Item 43, Exh. 28).

In 1950, the United States and Canada signed a new treaty ("1950 Treaty") which authorized the United States to divert a larger portion of water from the river than Niagara Mohawk could utilize at its twin hydroelectric plants. 1 U.S.T. 694.[2] During ratification, the United States Senate attached a reservation to this treaty which prohibited redevelopment of the Niagara River without express Congressional authorization. *Id.* at 699. The enactment of this reservation precipitated a seven-year debate in Congress over how to best develop and allocate hydroelectric power from the Niagara resource. Three main questions occupied Congress: (1) Should public bodies and nonprofit cooperatives be given preference to Niagara power and, if so, what form should the preference clause take?; (2) How much power, if any, should be reserved for preference customers in adjacent states?; and (3) Who should be licensed to develop the Niagara resource—a private utility, PASNY, or the federal

---

[1]Item numbers cited herein filed in *Occidental Chem. Corp. v. Power Auth. of the State of New York*, CIV-90-208, are cited without special notation. The companion case, *General Mills, Inc. v. Power Auth. of the State of New York*, CIV-90-391, has now been consolidated into *OCC v. PASNY*, CIV-90-208. *See* Item 46. Items filed in this case prior to consolidation are referred to as GM Item ____.

[2]It was at about this time that NFPC became Niagara Mohawk.

government? Only the last of these questions directly concerns us here.

Following ratification of the 1950 Treaty, Niagara Mohawk and other private utilities were the first to seek congressional authorization to develop additional generating capability. Support for this proposition was strongest in the House, where in 1953 the House passed a bill which provided for private development. *See* H.R. Rep. No. 862, 85th Cong., 1st Sess. 2, *reprinted in* 1957 U.S.C.C.A.N. 1585 ("House Report") (Item 42, Exh. 3). Public-power advocates succeeded in having this bill blocked in the Senate, however. These advocates supported development by PASNY, which in 1951 was authorized by the New York State legislature to develop the Niagara River. *See generally* N.Y. Pub. Auth. Law § 1000 *et seq.* (McKinney 1982). Prior to 1951, PASNY was limited to developing a hydroelectric facility on the St. Lawrence River. *See id.* While Congress debated these alternatives, Canada quickly developed additional hydroelectric power-generating capabilities and was permitted to use the United States' share of Niagara water.

On June 7, 1956, a rock slide destroyed Niagara Mohawk's Schoellkopf Station and its 365,000 kW generating capability. The Adams Plant was not affected, but it generated only 80,000 kW. The loss of this power from the Niagara region was potentially devastating to the industries that had located in the region to take advantage of NFPC's low-cost hydroelectric power. NFPC had generated low-cost power from the river for more than fifty years. The price of this power was, by 1915, regulated by the New York Public Service Commission ("NYPSC"), when NFPC filed its first rate tariff. *See* Item 43, Exh. 16. NFPC charged

high-load users[3] in the Niagara Falls area approximately three mills[4] per kilowatt hour ("kWh") for this power. *See* Item 38, ¶ 6 (explaining rate calculations). This rate was maintained by NFPC up through the destruction of the Schoellkopf Station. *Id.*, ¶¶ 7-9. With the loss of this low-cost source of power, industries were suddenly forced to purchase much more expensive power from Canada, and Canadian sources could not guarantee that this power would be available for any length of time. This crisis brought new urgency to congressional deliberations over development of the river. Congress was very concerned that, given the increased cost and uncertain availablility of power to meet their needs, industries in the Niagara region might be forced to leave the area, with serious adverse consequences for the region's economy. Accordingly, Congress quickly resolved its differences and enacted the NRA.

The NRA directed the FPC, since renamed the Federal Energy Regulatory Commission ("FERC"), to issue a license to PASNY to construct and operate a hydroelectric power project on the Niagara River to utilize all of the water allocated to the United States by treaty with Canada. 16 U.S.C. § 836(a). Given the additional water allocation, the new project was capable of producing 1,800,000 kW of firm power, nearly four times the power output of Niagara Mohawk's obsolete power stations. Congress directed the FPC to include the license, in addition to those conditions deemed necessary by it under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, seven additional conditions governing the distribution and sale of the new project's power. The

[3]The term "high-load user" refers to industries that contract for a steady stream of power, 24 hours a day. The Niagara River is perhaps the best river in the world at supplying a non-stop stream of water for hydroelectric use.

[4]One mill is equal to one tenth of a cent.

first condition granted "public bodies and nonprofit cooperatives within economic transmission distance" preference to acquire fifty percent of the project's power. 16 U.S.C. § 836(b) (1). This power was to "be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use . . . ." *Id.* Preference power not purchased by public power companies could be sold to private utilities, as long as "flexible arrangements" were made "to meet the reasonable foreseeable needs of the preference customers." *Id. See Power Auth. of the State of New York v. Federal Energy Regulatory Comm'n*, 743 F.2d 93, 103-07 (2d Cir. 1984) ("*PASNY v. FERC*") (interpreting preference clause of NRA). The second condition directed PASNY to make available to preference customers in neighboring states up to twenty percent of the fifty percent available to preference customers in New York. 16 U.S.C. § 836(b) (2).

The third condition is at the center of this case. It provided that PASNY "shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law" to sell to Niagara Mohawk, "for a period ending not later than the final maturity date of the bonds initially issued to finance" the Niagara project, 445,000 kW of project power

> for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, *in order as nearly as possible to restore low power costs to such industries* and for the same general purposes for which power from project 16 was utilized . . . .

16 U.S.C. § 836(b) (3) (emphasis added). The requirement that PASNY contract to sell this power to Niagara Mohawk

hinged on a proviso that Niagara Mohawk agree to surrender its FPC license to Project 16 and waive any claims for damages. *Id.* This block of power was designed to "replace" power lost to local industry as a result of the rock slide, and thus came to be called "Replacement Power." Prior to the rock slide, approximately 273,000 kW of the 445,000 kW generated by Niagara Mohawk's Project 16 went to Niagara Falls industries at the three mill rate. The balance of Project 16 power was sold to other customers in the region at a higher rate. *See* Item 47 at 4-6.

Of the remaining four conditions set forth in the NRA, only the fifth condition has any relevance to this case.[5] It provided:

> In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee [PASNY], consistent with paragraphs (1) and (3) of this subsection.

16 U.S.C. § 836(b) (5).

During the seven-year debate in Congress leading to passage of the NRA, numerous hearings were held, *see, e.g.* Item 42, Exhs. 6-11 (excerpts of hearing transcripts), and more than twenty bills were introduced. Several early bills called for private development. Other bills called for federal

[5]The fourth condition permitted PASNY to access or build transmission lines to distribute Niagara power. 16 U.S.C. § 836(b) (4). The sixth condition permitted PASNY, in conjunction with the State of New York, to spend up to $15,000,000 on a scenic drive and park on the American side of the Niagara River near Niagara Falls. 16 U.S.C. § 836(b) (6). Finally, the seventh condition required PASNY to reimburse the United States for its expenses engineering and/or constructing remedial works relating to the 1950 Treaty. 16 U.S.C. § 836(b) (7).

development. By the time of the rock slide, however, the overwhelming sentiment in Congress was to designate PASNY to develop the project. Plaintiffs argue that the main reason Congress chose PASNY over a private developer was that PASNY, as a nonprofit governmental agency, could produce the power more cheaply. PASNY could do this for three reasons: (1) it was exempt from state and federal taxes; (2) it could finance new construction less expensively through the sale of tax exempt bonds; and (3) as a nonprofit agency, it would not need to offer shareholders a rate of return on their investment. *See* Item 38, ¶¶ 23, 28. This appears to have been one of the reasons Congress selected PASNY to develop the Niagara River. *SEe* House Report, *supra,* at 7 ("The power can be produced by the power authority at a cost below that of other available sources of power."). There is no evidence, however, that it was the only reason.

In fact, the idea behind § 836(b) (3) did not originate in Congress. This provision stemmed from an accommodation between Niagara Mohawk and PASNY reached after the June 7, 1956, rock slide in which Niagara Mohawk not only abandoned its efforts to obtain congressional authorization to develop the full United States allocation of water, but stated its willingness to relinquish its own licensed allocation of water, and to waive all claims for compensation and/or damages associated therewith. In return, PASNY agreed to sell to Niagara Mohawk the same amount of power previously produced by the Adams Plant and the Schoellkopf Station—445,000 kW—for a period ending on the final maturity date of the bonds sold by PASNY to finance the new project. This accommodation would extend Niagara Mohawk's access to the 445,000 kW perhaps by thirty years or more, as its FPC license was due to expire in 1971 while PASNY's bonds were not likely to mature until after the

year 2000.[6] This agreement was memorialized in a September 19, 1956, amendment to the application PASNY had pending before the FPC for a license to construct a power project on the Niagara River. *See* Item 43, Exh. 33.[7] Shortly thereafter, this compromise was incorporated into House and Senate bills which, with minimal additional wrangling, became the NRA. *See* House Report, *supra*, at 6 (discussing compromise).

Once the NRA was passed, on January 30, 1958, the FPC issued a license to PASNY. 19 F.P.C. 186. This license incorporated verbatim the entire text of the NRA. *Id.* at 193-95. The license was dated September 1, 1957, and made effective for fifty years. PASNY completed construction on and began operation of the Niagara project in 1961.

After completing the hydroelectric project, in February, 1961, PASNY entered into a contract—Contract NS-1—to

[6]During oral argument, plaintiffs' counsel stated another reason why Niagara Mohawk was eager to make this arrangement with PASNY. By gaining longer-term access to 445,000 kW of hydroelectric power for industry, Niagara Mohawk could solidify the industrial base, and thus the overall market for electricity, in the Niagara region. Niagara Mohawk could then take advantage of this market through sales from other electricity sources. *See* Item 53 at 63-64.

[7]Frustrated by the delay in gaining a bill in Congress, PASNY elected in 1956 to pursue Niagara development directly by applying for a license from the FPC. PASNY's legal advisors felt that the reservation attached by the Senate to the 1950 Treaty was merely advisory, and did not preclude an applicant from obtaining a license even without congressional authorization. In early 1957, the Court of Appeals for the District of Columbia Circuit so held. *Power Auth. of the State of New York v. Federal Power Comm'n, 247 F.2d 538, 544 (D.C. Cir.), vacated, American Public Power Ass'n v. Power Auth. of the State of New York,* 355 U.S. 164 (1957) (vacated after passage of NRA). Until its agreement with Niagara Mohawk, however, PASNY did not seek in its application to use the water allocated to Niagara Mohawk prior to the 1950 Treaty.

sell 1,190,000 kW of power to Niagara Mohawk for resale to its customers. Of this allocation, 445,000 kW was designated as Replacement Power to be sold in accordance with the NRA to industrial customers within thirty miles of PASNY's Niagara switchyard. Item 44, Exh. 61, Part Two, Art. VI [hereinafter Contract NS-1]. PASNY specifically reserved the right within this contract to modify rates charged to Niagara Mohawk for Replacement Power.

> The rate schedules specified in this contract shall be subject to successive modification by the Authority through the promulgation of superseding rate schedules.

Contract NS-1, *supra*, General Power Contract Provisions, Part E at 24.

PASNY set the initial price for Replacement Power in 1961 at an average cost to industry of less than one-half cent per kWh (4.38 mills). Contract NS-1, *supra*, Schedule NP-F1. This rate remained constant until 1990. Plaintiffs receive this power pursuant to resale contracts with Niagara Mohawk at a price equal to Niagara Mohawk's cost plus a transmission and delivery charge. *See* Contract NS-1, *supra*, Exh. B. On September 26, 1989, PASNY filed notice of its first proposed increase in Replacement Power rates since 1961. Item 44, Exh. 78, ¶ 31. At that point:

> The President of PASNY, in a memorandum placed before the Trustees on that date, opined that although the price for Replacement Power "should, at a minimum, recover the cost of service, [it] need not be limited to that level." *See* [GM] Item 9, Exh. 5, at 16. The President also commented that additional revenue from sale of Replacement Power, if not

> needed under the terms of the "General Purpose Bond Resolution," could be used "for any lawful corporate purpose," including "funding the Authority's capital program, such as timely completion of the Niagara Expansion Project or the advance retirement of debt." *Id.*
>
> After public comment and response, *see generally* [GM] Item 9, Exh. 5, Richard M. Flynn, Chairman of PASNY, submitted a report to the Trustees on December 21, 1989 *id.* at 1-12, in which he recommended PASNY approve proposed price increases for 1990 and 1991 and defer decision on proposed increases for 1992-1997. *Id.* at 1. The Trustees adopted the Chairman's recommendations.

OCC v. PASNY, 758 F. Supp. at 857 (footnote omitted). New Replacement Power rates were implemented in 1990, 1991 and 1992.[8]

DISCUSSION

The issue before the court is whether § 836(b) (3) of the NRA requires PASNY to sell Replacement Power at its cost of producing that power. In interpreting the NRA, the court must begin by looking closely at the language of the statute. *E.g., Mallard v. United States Dist. Court,* 490 U.S. 296, 300 (1989); *United States v. Ron Pair Enter.,* 489 U.S. 235, 241 (1989); *Samuels, Kramer & Co. v. Commissioner,* 930 F.2d 975, 979 (2d Cir.), *cert. denied,* 112, S. Ct. 416 (1991). Where the statutory language is clear and unambiguous, that ends the court's inquiry. *Garcia v. United States,* 469 U.S. 70, 75 (1984); *United States v. Bonanno Organized Crime Family of*

[8]*See id.* at 857 n.6. The 1992 rate is just over one cent per kWh. Item 48 at 5 n.1.

La Cosa Nostra, 879 F.2d 20, 22 (2d Cir. 1989); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62-63 (2d Cir. 1985). If the statute is unclear, only then may the court turn to legislative history. *Garcia*, 469 U.S. at 75; *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

Turning to the text of the NRA, the first section directed the FPC, now named FERC, to issue a license to PASNY to develop a hydroelectric power project on the Niagara River utilizing all of the water allocated to the United States under the 1950 Treaty. 16 U.S.C. § 836(a). The FPC was instructed to include within this license seven conditions governing the distribution and sale of power generated by the project. 16 U.S.C. § 836(b). *See supra* (discussing conditions). This court must interpret the meaning of the third of these seven conditions. The entire text of that condition is as follows:

> The licensee [PASNY] shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Energy Regulatory Commission ("FERC") project 16 [Niagara Mohawk] for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, *in order as nearly as possible to restore low power costs to such industries* and for the same general purposes for which power from project 16 was utilized: *Provided*, That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon

> terms agreed to by both licensees and approved by the Federal Energy Regulatory Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

16 U.S.C. § 836(b) (3) (emphasis added and in original).

Reviewing this language from the beginning, the subsection states that PASNY "shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law" to sell to Niagara Mohawk "for a period ending not later than the final maturity date of the bonds initially issued to finance the project works," 445,000 kW of project power "which is equivalent to the amount produced by project 16 prior to June 7, 1956 . . . ." *Id.* The power sold to Niagara Mohawk, in turn, was designated for resale "generally to the industries which purchase power produced by project 16 prior" to June 7, 1956, "or their successors . . . ." *Id.* There is no dispute as to the meaning of this language.

There are, however, two important points about the statute to this point. First, § 836(b) (3) required PASNY to contract with Niagara Mohawk for a period "ending not *later* than" the final maturity date of the bonds PASNY would issue to finance the project. *Id.* (emphasis added). Congress did not require PASNY to sell Replacement Power for a period ending not *earlier* than the final maturity date

of PASNY's bonds. Thus, Congress did not contemplate that the 445,000 kW of project power reserved for the industries serviced by Niagara Mohawk would be available for an indefinite time. Once the maturity date on the initial PASNY bonds is reached in 2006, it is clear from the face of the statute that Replacement Power as a category of Niagara project power will cease to exist. Further, by specifying that PASNY "shall contract" for a period "ending not *later* than" the maturity date on the bonds, the statute contemplates that PASNY and Niagara Mohawk could have agreed to contract for a shorter period. Second, the language requiring PASNY to contract with Niagara Mohawk to sell it Replacement Power was triggered only if Niagara Mohawk met the conditions of a proviso, set forth in the second half of § 836(b) (3), under which Niagara Mohawk would agree to relinquish its FPC license and any other rights it may have held to Niagara water at the time the NRA was passed. *Id.* As the Senate Report accompanying the NRA stated:

> It is not the intention of the committee, however, to require that the capacity reserved for the Niagara-Mohawk Power Corp., be held in reserve for an indefinite period. If, for some reason the corporation declines to accept the amount of capacity specified, then the Power Authority of the State of New York should be free to dispose of the capacity to other users.

S. Rep. No. 539, 85th Cong. 1st Sess. 8 ("Senate Report") (Item 42, Exh. 5).

The critical language from § 836(b) (3), however, is found in the center of the subsection. Read in context, it provides that PASNY "shall Contract" with Niagara Mohawk to sell 445,000 kW of project power for resale to the

industries which purchased Project 16 power prior to June 7, 1956,

> *in order as nearly as possible to restore low power costs to such industries* and for the same general purposes for which power from project 16 was utilized . . . .

16 U.S.C. § 836(b) (3) (emphasis added). It is this language, and specifically the phrase "in order as nearly as possible to restore low power costs," that plaintiffs latch on to in an effort to prove that Congress required PASNY to sell Replacement Power at cost. Plaintiffs argue as follows.

First, plaintiffs look to the phrase "restore low power costs" from § 836(b) (3) and argue that what Congress intended PASNY to "restore" was the low cost of hydroelectric power enjoyed by Niagara area industries from Project 16. For a considerable number of industries in the Niagara region, Project 16 power was sold by Niagara Mohawk prior to the 1956 rock slide for approximately three mills per kWh. This fact is not in dispute.[9] It is also not in dispute that this rate was put into place by 1915 and was not changed for more than forty years thereafter. Thus, there is no question that many Niagara Falls industries, including plaintiffs in this case, enjoyed low power costs from Project 16 prior to the rock slide. Plaintiffs then note that the loss of this inexpensive power was of great concern to Congress. Lawmakers feared that the loss of this low cost power, upon which many local industries were deeply dependent, would

---

[9]Approximately 273,000 kW of Project 16 power was sold at the three mill rate. *See* Item 47 at 4-5.

have a disastrous effect on the economy of the area.[10] Congress understood that replacement and augmentation of this low-cost power, on the other hand, would permit these industries to expand.[11] Given these congressional concerns, plaintiffs argue that Congress designed the NRA to require PASNY to restore the low power costs charged to them by Niagara Mohawk prior to the destruction of the Schoellkopf Station.

Second, plaintiffs focus on the word "restore" and argue, based on Webster's dictionary, that "restore" means to "to bring back into existence or use," or "to bring back to an

[10]As the House report stated under the heading "EMERGENCY NEED FOR PROMPT LEGISLATION:"

> When [the rockslide] disaster occurred to the Schoellkopf powerplant of Niagara Mohawk Power Corp., the plant had a capacity of some 365,000 kilowatts of firm hydroelectric power. The operations of huge concentrations of electro-metallurgical and electrochemical industries at Niagara Falls depend in substantial part upon this capacity. These operations constitute the principal sources of employment in the Niagara frontier and comprise the heart of the economy of the area. They are vital to the national defense. Substitute power, largely imported from Canada on a temporary basis, is much more costly.

House Report, *supra*, at 2.

[11]Representative Blatnik, floor manager of the House bill, commented during floor debate: "They [basic industries] cannot continue to stay at Niagara unless newly developed low-cost power is made available. On the other hand, if it is again made available, they will remain and expand in the area." 103 Cong. Rec. 13, 196 (1957) (Item 42, Exh. 4). *See also* Senate Report, *supra*, at 7 ("Many of the industries were originally attracted to the area because of low power costs which were lost to them when the catastrophe occurred. Therefore, the interest of the industries is to obtain replacement of the low cost power lost and to obtain additional power for expansion.").

original state." *Webster's II New Riverside University Dictionary* (1984). This argument essentially repeats the first argument—that Congress intended to "restore" the low three mill rate industries enjoyed prior to the rock slide—albeit with a slightly different emphasis. Plaintiffs point out that the three mill rate charged some industries receiving power from Project 16 was based on Niagara Mohawk's expenses associated with that project, not with other more expensive power-generating facilities it owned. Plaintiffs also point out that the principal expenses in generating hydroelectric power is the cost of debt service associated with the initial construction of the hydroelectric facility. Niagara Mohawk was able to sell a substantial portion of Project 16 power at the three mill rate for more than forty years because it built the Project 16 plants at the turn of the century and its expenses remained stable throughout this period. Finally, plaintiffs point out that the industries which had located in this region to take advantage of these low rates testified before Congress of their concern that electricity costs remain stable over a long period so they could plan for the future.[12] From these premises, plaintiffs then leap to the conclusion that

> by "restore low power costs," Congress meant to reinstate for an extended period power costs which had been characterized by their long term stability and priced solely by reference to the cost of production at the Project 16 power generation facilities.

---

[12]Earle J. Machold, President of Niagara Mohawk, testified before the Senate:

> As has been said, these large industries in [the Niagara frontier] who use large amounts of power are rightfully concerned

(Footnote continued on next page.)

Item 37 at 16.

Third, plaintiffs accept that Congress could not have intended for PASNY *literally* to restore the three-mill rate charged to Project 16 customers because it understood, based on testimony before Congress that, given the costs of new construction, PASNY could not duplicate this low rate.[13] Realizing the three mill rate could not be met, Congress called for PASNY "*as nearly as possible* to restore

---

(Footnote continued.)
as to whether or not that cheap power is going to be or can be restored, and if so on how permanent a basis so they can make their plans for the future.

Development of Power as Niagara Falls, N.Y.: Hearings on S. 512 and S. 1037 Before the Subcomm. on Flood Control and Harbors—of the Senate Comm. on Public Works, 85th Cong., 1st Sess. 184 (April 10-13, 1957) ("1957 Senate Hearings") (Item 42, Exh. 6).

[13]An exchange between Earle Machold and Senator Carroll during Senate hearings was as follows:

> Senator Carroll: Was your output prior to the rockslide to be taken care of by the 445,000 kilowatts?
> Mr. Machold: Just a replacement.
> Senator Carroll: Is it anticipated that that replacement will permit you to sell power at about the same rate or at a higher rate?
> Mr. Machold: I doubt it will be at the same rate. It will be at a higher rate. How much higher I can't tell you. I think it would be in excess of probably 4 mills.

1957 Senate Hearings, *supra*, at 187 (Item 42, Exh. 6). Robert Moses, Chairman of PASNY, in a letter to Senator Clark included in the record of those hearings, estimated that "Niagara power will cost a high load factor customer about 3½ to 4 mills at the bus bar." *Id.* at 84. This estimate was echoed by Representative William A. Miller, sponsor of parallel legislation in the House, during the same hearings. *Id.* at 26.

low power costs. . . ." 16 U.S.C. § 836(b)(3) (emphasis added). Plaintiffs argue that when this phrase is considered in the context of PASNY's representations to Congress—that it could sell the power more cheaply than if a private utility were to build the project—it indicates that Congress understood that PASNY could most closely approximate the old Project 16 rates. PASNY cited three reasons why it could develop the project more cheaply: (1) it was exempt from state and federal taxes; (2) it could finance new construction less expensively through the sale of tax exempt bonds;[14] and (3) as a nonprofit agency, it would not need to offer share-

---

[14]An exchange between Representative Scherer and Mr. Moore, General Counsel of PASNY, during House hearings, went as follows:

> Mr. Scherer: Does the New York Power Authority pay any taxes to the Federal Government?
> Mr. Moore: It does not, sir.
> Mr. Scherer: If it develops this power will it pay any taxes to the Federal Government?
> Mr. Moore: Under the law as it stands now it will not.
> Mr. Scherer: Will it pay any taxes to the State of New York?
> Mr. Moore: Under the law as it stands now it will not, sir.
> Mr. Scherer: Will it pay any amounts for water usage?
> Mr. Moore: As the law is now it will not, sir.
> Mr. Scherer: Is that not the reason why you can pass economies on to the consumer?
> Mr. Moore: Is that the reason? That is one of the reasons. It is not the only reason.
> Mr. Scherer: It is just about the principal reason.
> Mr. Moore: No. Another reason is that we can borrow money cheaper. There is a big difference in operation there as far as the consumer is concerned. You take $400 million. The power companies put in $10 million and borrow the other $390 million at 3½ percent, and they will get 6 percent on the $390 million all through the years.

(Footnote continued on next page.)

holders a rate of return on their investment. Plaintiffs then extrapolate from these representations the conclusion that Congress intended by the phrase "as nearly as possible to restore low power costs" to require PASNY to sell Replacement Power at cost.

Plaintiffs' reading of the statute appears to the court to be quite contrived. The words chosen by Congress simply do not support the meaning ascribed to them by plaintiffs. Let us proceed step by step.

Beginning as we must with the language of the statute, *see, e.g., Mallard*, 490 U.S. at 300; *Ron Pair Enterprises*, 489 U.S. at 241; *Samuels, Kramer & Co.*, 930 F.2d at 979, the NRA directs PASNY to sell Replacement Power to Niagara Mohawk for resale to local industry "in order as nearly as possible to *restore low power costs to such industries*. . . ." 15 U.S.C. § 836(b)(3) (emphasis added). Plaintiffs would have this court interpret this phase as requiring PASNY to sell Replacement Power "at cost" or "at PASNY's cost of production." Congress, however, did not use the phrase "at cost" or any similar phrase in the NRA. The word "costs" in § 836(b)(3) refers to *industries'* costs, not PASNY's. There is no reference whatsoever in the NRA, nor in the legislative history, which discusses *PASNY's* "costs" in setting a rate for Replacement Power.

(Footnote continued.)

The power authority will borrow the same money for less than 3 percent, and all the consumers will pay for is what the power authority pays out, which is less than 3 percent. It is a big and tremendous difference there.

Niagara Power: Hearing on S. 1823 and H.R. 11477 Before the House Comm. on Public Works, 84th Cong., 2d Sess. 36-37 (1956) ("1956 House Hearings") (Item 42, Exh. 7). It must be noted that these hearings were before a different Congress than that which passed the NRA. In 1957, the NRA was whisked through the House committee without hearings or debate right to the House floor.

Section 836(b)(3) also does not use the word "rate." This word is used only in § 836(b)(1), which gives public bodies and nonprofit cooperatives preference to power for the benefit of consumers, "to whom such power shall be made available at the lowest rates reasonably possible. . . ." 16 U.S.C. § 836(b)(1).

The words "cost" and "rate" were, however, critical to Congress when it drafted contemporaneous statutes to establish cost-based rates for government-sponsored hydroelectric power projects. At the time Congress passed the NRA, it had recently passed legislation authorizing the disposition of electricity generated at Falcon Dam on the Rio Grande. This statute specifically provided for a cost-based determination of electricity rates by directing the Department of the Interior to:

> [T]ransmit and dispose of such power and energy . . . *at the lowest possible rates* to consumers consistent with sound business principles. . . . *Rate schedules shall be drawn having regard to the recovery . . . of the cost of producing and transmitting such electric energy,* including the amortization of the capital investment allocated to power . . . over a reasonable period of years.

Falcon Dam on the Rio Grande, ch. 310, 68 Stat. 255 (1954) (emphasis added) ("Falcom Dam Act"). Nearly identical language was used in section 5 of the Flood Control Act of 1944. 16 U.S.C. § 825s. This language set the kind of cost-based standard that plaintiffs seek to impose on the NRA. *See United States v. Tex-La Elec. Coop., Inc.*, 693 F.2d 392, 394 (5th Cir. 1982); *Associated Elec. Coop., Inc. v. Morton*, 507 F.2d 1167, 1173-74 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). Congress was fully aware of

this language when it adopted the NRA. *See* House Report, *supra*, at 2, 7-8 (noting section 5 of the Flood Control Act). *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Bonanno*, 879 F.2d at 25. This language was not used in § 836(b)(3) of the NRA, however.[15] Had Congress intended to require PASNY to sell Replacement Power at cost, it could easily have said so in unequivocal language. *See PASNY v. FERC*, 743 F.2d at 104 (interpreting § 836(b)(1) of the NRA: "If Congress had wanted to restrict resale to domestic and rural consumers it could easily have done so simply by stating that the power was to be made available to public bodies 'for resale only' to such consumers."). *See also West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138, 1147 (1991) ("Congress could easily have

[15]Language even more detailed than that used in the Falcon Dam Act and the Flood Control Act was used in the statute establishing the Tennessee Valley Authority ("TVA"), which was passed in 1959, just two years after enactment of the NRA. That statute provided:

> The Corporation shall charge rates for power which will produce gross revenues sufficient to provide funds for operation, maintenance, and administration of its power system; payments to States and counties in lieu of taxes; debt service on outstanding bonds, including provision and maintenance of reserve funds and other funds established in connection therewith; payments to the Treasury as a return on the appropriation investment . . . and such additional margin as the Board may consider desirable for investment in power system assets, retirement of outstanding bonds in advance of maturity, additional reduction of appropriation investment, and other purposes connected with the Corporation's power business, having due regard for the . . . objective that power shall be sold at rates as low as are feasible.

16 U.S.C. § 831n-4(f).

shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction."); *Regan v. Wald*, 468 U.S. 222, 235-36 (1984) ("If Congress had wished to freeze existing restrictions, it could easily have done so explicitly."). Congress did not do so.

The phrase "restore low power costs" also cannot mean "sell at cost" or "restore power sold at cost" by plaintiffs' own analysis. Plaintiffs' main argument is that the phrase "low power costs" in § 836(b)(3) was understood by Congress to refer to the three mill rate charged to high-load industrial customers of Project 16. Plaintiffs readily admit that, prior to the rock slide, Niagara Mohawk provided these industries with "low power costs." What plaintiffs fail to point out, however, is that even though the three-mill rate charged by Niagara Mohawk was very low, and had not been changed for some customers for more than forty years, it was *never* sold by Niagara Mohawk "at cost." Niagara Mohawk, as a private utility, set the rates for each category of Project 16 power so that it would reap a profit on that sale. Indeed, it appears that Niagara Mohawk's "cost" of production of Project 16 power was approximately one-and-one-half mills, or roughly fifty percent of the rate it charged industrial customers.[16] Thus, Congress, which was well

---

[16]During 1955 Senate hearings, Earle Machold of Niagara Mohawk had the following exchange with Senator Kerr, the Senator who fashioned the compromise that became the NRA:

> Senator Kerr: Roughly, what does it cost to produce that [Project 16] power?
>
> . . .

(Footnote continued on next page.)

aware of these facts when it drafted the NRA, could not have meant by the phrase "restore low power costs to such industries" to require PASNY to sell Replacement Power "at cost," because industries in the Niagara region had never received Project 16 power "at cost."[17] At most the phrase requiring PASNY to sell Replacement Power to Niagara Mohawk for resale "in order as nearly as possible to restore low power costs to such industries" meant that

---

(Footnote continued.)

Mr. Machold: I am advised by my associate that, including fixed charges, taxes, *return*, and depreciation, it costs about 3 mills to produce that power.

Senator Kerr: If that is true, how is it that you sell industry the power at 3 mills?

Mr. Machold: I am coming to that, sir. The production costs, which do not include depreciation, insurance, and *return on investment*, costs about a mill and a half to produce it.

Senator Kerr: Is that over and about the rental?

Mr. Machold: That includes the rental.

Senator Kerr: What did you say?

Mr. Machold: Including the rental.

Senator Kerr: Then 3 mills covers cost of production, depreciation, fixed charges, taxes, and *return*?

Mr. Machold: That is right.

Niagara River Power Project: Hearings on S. 6 and S. 1823 Before a Subcomm. of the Senate Comm. on Public Works, 84th Cong., 1st Sess. 175-76 (1955) (emphasis added) ("1955 Senate Hearings") (Item 42, Exh. 8).

[17]Further, Although Niagara Mohawk chose not to do so, it was entitled to seek rate increases for Project 16 power before the NYPSC.

PASNY should provide low-cost power to these industries.[18] The phrase "low power costs" means what it says: low-cost power. It does not mean "at cost" power.

PASNY was capable of supplying lower cost power to industry than a private developer could because, as noted above, it (1) was exempt from state and federal taxes; (2) could finance new construction more economically through sale of tax exempt bonds; and (3) did not pay stockholders a rate of return on their investment. But, contrary to plaintiffs' claims, PASNY was not required to market power sold to industry "at cost." PASNY's enabling statute, N.Y. Pub. Auth. Law § 1000 *et seq.* (McKinney's 1982), which was in place well in advance of the NRA, specifically empowered the Authority:

> To develop, maintain, manage and operate those parts of the Niagara and Saint Lawrence hydroelectric projects owned or controlled by it . . . that in the development of hydroelectric power therefrom such projects shall be considered primarily as for the benefit of the people of the state as a whole and particularly the domestic and rural consumers to

[18]In *Airco Alloys Div., Airco Inc. v. Niagara Mohawk Power Corp.*, 411 N.Y.S.2d 460 (N.Y. App. Div. 1978), the Fourth Department of the New York State Appellate Division was called upon to interpret the contract between PASNY and Niagara Mohawk—Contract NS-1—which was authorized under § 836(b)(3) of the NRA. The court opined that the language of § 836(b)(3) of the "accorded [plaintiffs] nothing more than *a mere expectation* that low-cost power would again become available, and any enforcible [*sic*] rights to that power were granted only by Contract NS-1." *Id.* at 465 (emphasis added). In Contract NS-1, PASNY expressly reserved the right to modify the rates for Replacement Power. Contract NS-1, *supra*, General Power Contract Provisions, Part E ("The rate schedules specified in this contract shall be subject to successive modification by the Authority. . . .").

> whom the power can economically be made available, *and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns to permit domestic and rural use at the lowest possible rates . . .*

Id. at § 1005(5) (emphasis added). Although this statute requires PASNY to charge a cost-based rate for hydroelectric power sold to domestic and rural consumers, it specifically permits higher-than-cost rates to be charged industry, with any excess to be transferred to PASNY's general fund. *Auer v. Dyson*, 444 N.Y.S.2d 513, 517-18 (N.Y. Sup. Ct. 1981). *See also Auer v. Dyson*, 479 N.Y.S.2d 102, 104 (N.Y. Sup. Ct. 1984), *aff'd*, 491 N.Y.S.2d 1022 (N.Y. App. Div. 1985). This specific provision was brought to the attention of Senators Javits and Ives, key supporters of the NRA, in a letter dated July 5, 1957, by Louis K. Lefkowitz, Attorney General of New York. *See* Item 39, Exh. B at 10-11.[19] There is no evidence that Congress intended to supersede the plain terms of this New York statute.

It is also important to look at *all* of § 836(b)(3) when investigating the meaning of the particular phrase plaintiffs focus on. As mentioned previously, § 836(b)(3), strictly speaking, did not *require* PASNY to sell 445,000 kW of project power to Niagara Mohawk *at all*. The arrangement under which PASNY would contract with Niagara Mohawk for the sale of 445,000 kW of project power was contingent

[19]Several Congressmen mentioned during floor debate that the NRA was consistent with the New York Public Authorities Law. *See* 103 Cong. Rec. 14,438 (1957) (remarks of Senator Chavez); *id.* at 14, 442 (remarks of Senator Javits); 103 Cong. Rec. 13,203 (1957) (remarks of Representative Dooley).

on the proviso that Niagara Mohawk be willing to surrender its FPC license and any other claims to Niagara water it may have had, plus any claims for compensation and/or damages associated therewith. The Senate report accompanying the NRA stated that should Niagara Mohawk for any reason not agree to the arrangement, PASNY was free to market Niagara project power to whomever it chose. *See supra*. The statute also specified that the Replacement Power contract between PASNY and Niagara Mohawk, if it were consummated, should be "for a period *ending not later than* the final maturity date of the bonds initially issued to finance the project . . ." 16 U.S.C. § 836(b)(3) (emphasis added). This language, which is not in dispute, indicates that Congress was concerned with the immediate crisis facing industry in the late 1950s and early 1960s. There is no indication from the statute that Congress intended that the rates for Replacement Power be fixed at their 1961 level, the year the NRA facilities were completed, indefinitely into the future.

Accordingly, based solely on an analysis of the statutory language, the court finds that the NRA does not require a cost-based rate for Replacement Power.

This conclusion squares with contemporaneous statutes discussed above which granted preference to power from public projects to "public bodies and cooperatives," and which reserved the "lowest possible rates" for "*consumers*," not industry. *See* Falcon Dam Act, *supra*, at 256; Flood Control Act, 16 U.S.C. 825s (emphasis added). This same bias is reflected in § 836(b)(1) of the NRA. Plaintiffs, on the other hand, can point to no other federal statute which has granted industry an at-cost preference to public hydroelectric power. *See West Virginia Univ. Hosp.*, 111 S. Ct. at 1147 (finding record of statutory usage important in determining whether federal statute's use of phrase "attorney's

fee" included separately-billed expenses for law clerks and paralegals).

This conclusion also squares with the legislative history of the NRA. Before launching into an analysis of the legislative history, however, the court notes that "we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language." *Garcia*, 469 U.S. at 75. *See also North Dakota v. United States*, 460 U.S. 300, 312 (1983); *United States v. Hescorp. Heavy Equip. Sales Corp.*, 801 F.2d 70, 75-76 (2d Cir.), *cert. denied*, 479 U.S. 1018 (1986); *Friends of the Earth*, 768 F.2d at 62-63. Further, not all sources of legislative history are entitled to equal consideration. The Supreme Court has "repeatedly stated that the authoritive source for finding the Legislature's intent lies in the Committee Reports on the bill . . ." *Garcia*, 469 U.S. at 76 (citing *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). *See also In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988). The comments of a single legislator are entitled to significantly less weight. *Garcia*, 469 U.S. at 76; *Consumer Prod. Safety Comm'n.*, 447 U.S. at 118; *Murphy v. Empire of Am.*, 746 F.2d 931, 935 (2d Cir. 1984). If such comments are made by a legislator *after* a bill's passage, they are entitled to almost no weight. *Bread Political Action Comm. v. Federal Election Comm'n.*, 455 U.S. 577, 582 n.3 (1982); *Consumer Prod. Safety Comm'n.*, 447 U.S. at 118 n.13; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1475 (9th Cir. 1987). Importantly, no significance should be accorded statements made by interested *witnesses* at congressional hearings, especially if these are not included in House or Senate reports. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); *Regan v. Wald*, 468 U.S. at 237; *McCaughn v. Hershey Chocolate Co.*, 283 U.S.

488, 493-494 (1931); *T.B. Harms Co. v. Jems Records, Inc.*, 655 F. Supp. 1575, 1581 (D.N.J. 1987); *Harry Fox Agency v. Mills Music, Inc.*, 543 F. Supp. 844, 864-65 (S.D.N.Y. 1982), *rev'd*, 720 F2d 733 (2d Cir. 1983), *rev'd sub nom., Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985). 2A N. Singer, *Sutherland on Statutory Construction* § 48.10 at 343 & n.15 (5th ed. 1992).

With these considerations in mind, the court searches in vain for any statement in the legislative history by a member of Congress which expressed an understanding that NRA required PASNY to sell Replacement Power at cost.[20] The committee reports are replete with statements similar to the following: "Practically everyone was in agreement that restoration of low-cost power to the industries in the Niagara area is desirable." Senate Report, *supra*, at 7. *See also, supra* notes 10-11 and accompanying text (discussing congressional concerns over restoration of low-cost power).

[20]The lone exchange cited by plaintiffs took place between Senator Carroll and Thomas F. Moore, Jr., PASNY's General Counsel, during the 1957 Senate Hearings. That exchange went as follows:

> Senator Carroll: What would be the pay-out period on the project?
>
> Mr. Moore: The actual pay-out period will be 35 years. The long term will be a little longer because of that amortization provision in the bonds.
>
> Senator Carroll: When the pay-out period is over, do the revenues go to the New York State Authority?
>
> Mr. Moore: No. Under the law that Senator Javits told you about, that established the power authority, *the power authority is mandated to sell power at cost. That is all. We don't make any profit. Nobody makes any profit.* And it will continue to be sold as long as we are in business.
>
> Senator Carroll: That is a very important point. I didn't understand that.

(Footnote continued on next page.)

Congress was concerned because the loss of inexpensive Project 16 power, which forced industries to scramble for much more expensive and less reliable Canadian power, posed the threat that if inexpensive power did not again become available, industries would leave the Niagara region, with devastating effect on the local economy. *See* Senate Report, *supra*, at 7-8; House Report, *supra*, at 2, 8. But these concerns, expressed in the requirement that PASNY "restore low power costs to such industries," cannot be reasonably read to require PASNY to sell Replacement Power at cost.

(Footnote continued.)

1957 Senate Hearings, *supra*, at 175 (emphasis added).

This statement, however, coming as it does from a witness, is completely without value in determining Congress's intent behind the NRA. *See, e.g., Kelly*, 479 U.S. at 51 n.13; *McCaughn*, 283 U.S. at 493-94. Moreover, just prior to this quotation, Senator Carroll and Mr. Moore are discussing the *St. Lawrence* project, not the Niagara project. Mr. Moore's reference to "the bonds" appears to refer to the former project, for which bonds had already been issued; the bonds for the Niagara project would not be issued for some time. Thus, it is not at all clear that the parties are even discussing the Niagara project. Finally, if the highlighted statement is understood to mean more than that PASNY does not pay a rate of return to private investors, and thus makes no "profit," it is simply false. For many classes of power sold by PASNY, e.g., Expansion Power, even plaintiffs admit this power need not be marketed "at cost." *See* N.Y. Pub. Auth. Law § 1005(5); *Auer v. Dyson*, 444 N.Y.S.2d at 517-18.

Were this Congress's intent, presumably there would have been some discussion of the factors that might be considered part of PASNY's "costs" in selling Replacement Power. *Compare* 16 U.S.C. § 825s (Flood Control Act); § 831n-4(f) (TVA statute); ch. 310, 68 Stat. 255 (Falcon Dam Act). Yet there is not a word of discussion in the legislative history of rate formulas, or the items that might go into a determination of PASNY's "costs" in selling Replacement Power.[21]

To this court it is clear that Congress's main concern in providing low-cost power to industry in the Niagara region was to avoid economic dislocation should such industry be forced to move their operations in search of lower-cost power. This concern has been satisfied.[22] Industry has not moved from the Niagara region because, even with the higher rates so far implements by PASNY[23] Replacement Power is still apparently the cheapest firm industrial power

---

[21]By contrast, PASNY's enabling statute sets forth the elements which may be included in setting its cost-based rate for domestic and rural consumers. N.Y. Pub. Auth. Law § 1005(5). *See Auer v. Dyson*, 444 N.Y.S.2d at 518 n.6. This statute was in place at the time the NRA was enacted.

[22]Congress was also interested, as mentioned above, *see supra* note 11 and accompanying text, in encouraging expansion of industry in the Niagara region. Permitting PASNY to raise industrial rates to help fund additional power-generating projects would seem to further that goal.

[23]The 1991 rate for Replacement Power was approximately 9 mills, or less than one cent per kWh. In 1992 this rate increased to just over one cent per kWh. *See* Item 39, ¶ 60; Item 48 at 5 n.1.

in the United States, and by a wide margin.[24] Until Replacement Power rates were increased for the first time in January, 1990, the effects of inflation had steadily diminished the cost to industry of Replacement Power. At the end of 1989, Replacement Power cost industry just thirty-five percent in real terms of what it cost industry in 1961. *See* Item 39, ¶ 61. Meanwhile, other industrial rates charged Niagara area industries continued to increase, such that even at the 1992 rate of approximately one cent per kWh, Replacement Power cost less than one-sixth the rate charged to Niagara Mohawk's other industrial customers in the Niagara area. *Id.*

Accordingly, from an analysis of the statute and the legislative history, the court holds that the NRA does not mandate a cost-based rate for Replacement Power.

Plaintiffs seek to avoid this conclusion by citing statements made by PASNY to the FPC, the Governor of New York, and other parties *after* enactment of the NRA which they contend restrict PASNY to a cost-based Replacement Power rate. *See, e.g.*, Item 37 at 20-33. The post-enactment statements of PASNY representatives, however, have no relevance in determining *congressional* intent. *See. e.g., Bread Political Action Comm.,* 455 U.S. at 582 n.3; *Consumer Product Safety Comm'n.,* 447 U.S. at 118 n.13 (1980); *Regional Rail Reorganization Act Cases,* 419 U.S.

---

[24]The record is not complete in this regard because discovery was not completed prior to the filing of the present motions. Nevertheless, plaintiffs have admitted that " '1991 Replacement Power rates are priced below virtually all rates for firm power sold to industrial customers in service territories in geographic areas of the United States. . . ' " Item 39, ¶ 62 (quoting plaintiffs' response to defendant's first set of interrogatories).

at 132; *Cook Inlet Native Ass'n*, 810 F.2d at 1475.[25] This court must decide what Congress meant when it enacted the NRA, not what PASNY may have thought Congress meant several years later.[26] Moreover, under the NRA, PASNY is a mere *licensee*. As a licensee, it does not have the same

---

[25]Plaintiffs do not argue at this point that PASNY is bound under a theory of promissory estoppel to alleged promises it made with respect to the NRA. Even if they did, this theory has been rejected by the New York State Appellate Division. *See Advanced Refractory Technologies, Inc. v. Power Auth. of the State of New York*, 568 N.Y.S.2d 986, 987 (N.Y. App. Div.), *appeal dismissed*, 573 N.Y.S.2d 642 (N.Y. 1991) ("Absent an unusual factual situation, not present here, estoppel is not available against a governmental agency exercising its governmental function.") *See also United States v. Boccanfuso*, 882 F.2d 666, 670 (2d Cir. 1989); *United States v. Schmitt*, 734 F. Supp. 1035, 1055 (E.D.N.Y. 1990). Rather, plaintiffs assert that PASNY's contemporaneous interpretations of the NRA should be given substantial weight. For the reasons stated in the text and in footnote 26, the court finds this argument to be without merit.

[26]Plaintiffs chiefly rely on language in *PASNY v. FERC*, 743 F.2d at 106, to rebut these conclusions. In that case, the Second Circuit, reviewing the preference language of § 836(b)(1) of the NRA, held that according to the plain language of the statute there was no "end-use" restriction on the resale of power sold to preference customers. *Id.* at 104. The court noted that absent the clearest expression of congressional intent to the contrary, this plain language must govern. *Id.* at 103. The court held that there was no contrary congressional intent. *Id.* at 105. The court then noted that PASNY, which took a contrary view in *PASNY v. FERC*, had taken a position in prior litigation and in statement by trustees consistent with the Second Circuit's reading of the plain statutory language. *Id.* at 105-06. The court concluded: "In light of this background, and the NRA's plain language and legislative history, PASNY's changed position [in the current case] is not entitled to any weight." *Id.* at 106.

Plaintiffs argue from this conclusion that, given various representations PASNY allegedly made prior to this litigation that Replacement

(Footnote continued on next page.)

authority, as federal agencies often do, to interpret the statute. *See. e.g., Rust v. Sullivan,* 111 S. Ct. 1759, 1767 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-44 (1984); *EPA v. National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980).[27] Therefore, this court need not accord great deference to PASNY's interpretation of the NRA.[28]

(Footnote continued.)
Power must be sold at cost, its position in the present case should not be granted any weight. That my be. Plaintiffs' argument misses the mark, however, because even if this court accords *no* weight to PASNY's present position on the meaning of the NRA, that has no bearing on determining *Congress's intent in drafting the NRA. In PASNY v. FERC,* the Second Circuit did not in any way rely on statements made by PASNY to evidence *congressional* intent in enacting the NRA. The court merely stated that PASNY's waffling interpretation of the NRA undermined its then-current arguments.

[27]Even if PASNY was considered analogous to the agencies in *Chevron* and *Rust,* it would then be entitled to change its interpretation of the NRA. *Rust,* 111 S. Ct. at 1769; *Chevron,* 467 U.S. at 863.

[28]Further, even some of the statements cited by plaintiffs which purport to bind PASNY to a cost-based rate for Replacement Power do not suggest that PASNY was bound to such a rate for the indefinite future. To take one statement as an example, consider the January 10, 1961, letter from Chairman Moses to Governor Rockefeller in which PASNY sought approval, pursuant to § 836(b)(3), from the Governor for its contract to sell Replacement Power to Niagara Mohawk. Chairman Moses of PASNY wrote:

> The Authority has conscientiously followed the federal and state statutes with the result that the first 445,000 kw produced will go to the completely essential industry which is the lifeblood of the frontier *at the price it costs the Authority to produce it plus a very reasonable wheeling charge to Niagara Mohawk which buys the power from the Authority and delivers it.*

Item 43, Exh. 37 (emphasis added). This statement is made in the present tense. It cannot be read to obligate PASNY to sell Replacement Power at cost for the indefinite future.

Plaintiffs advance two final arguments. First, plaintiffs argue that the language in § 836(b)(5) of the NRA, which states that "[i]n the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by [PASNY], consistent with paragraphs (1) and (3) of this subsection," 16 U.S.C. § 836(b)(5), would be meaningless unless § 836(b)(3) established a cost-based rate standard for Replacement Power. Defendant counters that § 836(b)(5) cannot be read to establish a particular rate standard if no such standard exists in § 836(b)(3). The court finds defendant's argument persuasive. In terms of setting rate standards, § 836(b)(5) has no content of its own; it is entirely dependent on the content of subsections (b)(1) and (b)(3). This point can be seen by comparing § 836(b)(5) with a similar clause in PASNY's enabling statute, which states: "Contracts for the sale, transmission and distribution of power generated by [PASNY's hydroelectric] projects shall provide for the effectuation of the foregoing policy . . ." N.Y. Pub. Auth. Law § 1005(5). The "foregoing policy," which has been quoted previously in this opinion, set forth two different rate standards: first, a cost-based standard for domestic and rural consumers, and second, a standard for sale to industry as a "secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns to permit domestic and rural use at the lowest possible rates . . ." *Id.* Both § 1005(5) and § 836(b)(5) direct PASNY to ensure that contracts for sale (or resale) of its hydroelectric power comply with previously-referenced standards. Neither section, however, requires that those standards be cost-based.

This conclusion is not contradicted by the legislative history of the NRA, as there is almost no discussion therein about § 836(b)(5). The lone reference to this subsection in the committee reports accompanying the NRA is found in

the House Report, *supra*, at 11, which simply rephrases the language quoted above. As stated previously, had Congress intended to set a cost-based standard for Replacement Power, it could have done so in unequivocal language. Section 836(b)(5) simply does not state that Replacement Power must be sold at cost.[29]

Plaintiffs' final argument is that Congress could not have intended to grant PASNY unfettered discretion to determine the rates it would charge for Replacement Power. *See, e.g.* Item 37 at 14 n.7. This argument, of course, begs the question of what Congress intended without providing meaningful additional evidence or analysis. Besides, PASNY's actions are not completely beyond review. Even in cases where courts have held that Congress has provided "no law to apply," *See OCC v. PASNY*, 758 F. Supp. at 857-58 (discussing cases), if an agency "has ignored a plain statutory duty, exceeded its jurisdiction, or committed constitutional error," a court may step in. *Hahn v. Gottlieb*, 430 F.2d 1243, 1251 (1st Cir. 1970). *See also Langevin v. Chenango Court*, 447 F.2d 296, 304 (2d Cir. 1971); *Massachusetts Pub. Interest Group v. United States Nuclear Regulatory Comm'n*, 852 F.2d 9, 19 (1st Cir. 1985). Moreover, the NRA itself is not without checks on the discretion of PASNY. First, PASNY was required to obtain a license issued by the FPC. Second, PASNY's contract with Niagara Mohawk for the sale of Replacement Power was subject to "the approval of the Governor of the State of New York, pursuant to the procedure established by New York law . . ." 16 U.S.C. § 836(b)(3). Finally, PASNY was required to convince Niagara Mohawk to consent to the surrender of its FPC license, along with any claims for damages associated there-

[29]It appears to this court that the most important element of § 836(b)(5) is that it grants PASNY, as opposed to the FPC, the authority to approve resale rates. This authority is mentioned nowhere else in the NRA.

with, before PASNY could gain access to all of the water flow from the Niagara River. *Id.*

For all the foregoing reasons, the court holds that § 836(b)(3) of the NRA does not require PASNY to sell Replacement Power at cost.

The parties are directed to meet with the court on March 26, 1992, at 2:00 p.m.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: March 11, 1992

APPENDIX D—Opinion of the United States District Court, Western District of New York, Dated March 15, 1991.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

OCCIDENTAL CHEMICAL CORPORATION and THE PILLSBURY COMPANY,

Plaintiffs,

-vs-

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendants.

CIV-90-208C

GENERAL MILLS, INC., and BETHLEHEM STEEL CORPORATION,

Plaintiffs,

-vs-

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendant.

CIV-90-391C

APPEARANCES:

SUTHERLAND, ASBILL & BRENNAN (EARLE H. O'DONNELL, ESQ., of Counsel), Washington, D.C., for Plaintiff Occidental Chemical Corporation and The Pillsbury Company.

COUCH, WHITE, BRENNER, HOWARD & FEIGENBAUM (ALGIRD F. WHITE, JR., ESQ., of Counsel), Albany, New York, for Plaintiffs General Mills, Inc., Bethlehem Steel Corporation, Nabisco Brands, Inc., and Union Carbide Corporation.

MITCHELL F. BORGER, ESQ., New York, New York, for Defendant Power Authority of the State of New York.

BACKGROUND

The central issue in both of these cases is whether the Power Authority of the State of New York ("PASNY") is authorized under the Niagara Redevelopment Act ("NRA"), 16 U.S.C. §§ 836, 836a, and/or its license issued thereunder by the Federal Power Commission ("FPC"), 19 F.P.C. 186 (Jan. 30, 1958),[1] to independently raise utility rates for Replacement Power as defined in the NRA. 16 U.S.C. § 836(b)(3). Plaintiffs in both cases allege that PASNY was without authority to raise rates and therefore

---

[1]The Federal Power Commission is now the Federal Energy Regulatory Commission ("FERC"). *See* 42 U.S.C. §§ 7151(b), 7171(a), 7172(a), 7291, 7293.

violated section (b)(3) of the NRA, 16 U.S.C. § 836(b)(3),[2] and Article 22 of its federal license, 19 F.P.A. 186, and the Federal Power Act ("FPA"), 16 U.S.C. § 791 *et seq.* GM Item 7, ¶¶ 56-57; OCC Item 1, ¶¶ 43-44. In addition, plaintiffs in the *General Mills* case append three causes of action alleging that PASNY violated state law. GM Item 7, ¶¶ 58-82.

Plaintiffs seek a declaratory judgment that PASNY's increased Replacement Power rate is illegal, a declaration prohibiting PASNY from setting rates above the cost of producing Replacement Power from PASNY's Niagara Power Project, an injunction holding PASNY to these rulings, and damages for any revenue collected in excess of such costs. Defendants move to dismiss plaintiffs' complaints under Fed. R. Civ. P. 12(b) on the grounds that (1) plaintiffs fail to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), (2) the court should abstain from entertaining jurisdiction of this matter in the interest of comity, and (3) in *General Mills*,[3] once the federal claims are dismissed, the court should also decline pendant jurisdiction over the state law claims. Plaintiffs oppose the motion.

FACTS

There appear to be no facts in dispute. To understand this controversy, however, a bit of history is in order. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S.

[2]Item 7, ¶¶ 54-55, *Occidental Chem. Corp. v. Power Auth. of the State of New York*, CIV-90-208 [hereinafter OCC Item ____]; Item 1, ¶¶ 41-42, *General Mills, Inc. v. Power Auth. of the State of New York*, CIV-90-391 [hereinafter GM Item ____].

[3]In *Occidental Chem. Corp.*, plaintiffs only raise federal claims. OCC Item 1.

99, 100-06 (1960) (detailing history surrounding passage of NRA). Under the Boundary Waters Treaty of 1909, 36 Stat. 2448, the United States and Canada agreed to permit each country to divert some of the flow of the Niagara river to produce electric power. In 1950, a new treaty was ratified ("1950 Treaty") which authorized the United States to divert a larger portion of water from the river. 1 U.S.T. 694. In ratifying the treaty, the United States Senate attached a provision requiring express Congressional authorization to develop the river.

Prior to June 7, 1956, the Niagara Mohawk Power Corporation ("Niagara Mohawk"), a public utility company, operated two hydroelectric power-generating stations on the Niagara River: the Adams Plant and the Schoellkopf Station. These plants, known as FPC Project 16 ("Project 16"), were operated pursuant to a license issued to Niagara Mohawk by the FPC. 1 F.P.C. 16. A number of industries, including the plaintiffs in these actions, located in the Niagara region to take advantage of the low cost power generated by Project 16. On June 7,1956, however, a rockslide destroyed the Schoellkopf Station, dramatically reducing the power output of Project 16.

In response to the sudden loss of power-generating capacity in the Niagara region, Congress enacted the NRA, 16 U.S.C. §§ 836, 836a, in 1957 directing the FPC to issue a license to PASNY "for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." 16 U.S.C. § 836(a). Congress also directed that the FPC include in that license, in addition to those conditions deemed necessary by the FPC under the Federal Power Act, 16 U.S.C. § 791 *et seq.*, seven additional conditions governing the distribution and sale of the new project's power. 16 U.S.C. § 836(b)(1)-(7).

These congressional conditions required that at least fifty percent of the project's power be available for the benefit of consumers, "to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use," § 836(b)(1), that a "reasonable" portion of the project's power, but not more than twenty percent, be sold to neighboring states, § 836(b)(2), and that

> (3) The licensee [PASNY] shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Energy Regulatory Commission ("FERC") project 16 [Niagara Mohawk] for a period not ending later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, *for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible or restore low power costs to such industries* and for the same general purposes for which power from project 16 was utilized. . . .

§ 836(b)(3) (emphasis added). This last block of power was designed to "replace" power lost to local industries as a result of the slide, and thus came to be called "Replacement Power."

Pursuant to this statute, the FPC issued a license to PASNY on January 30, 1958. 19 F.P.C. 186. Article 22 of the FPC license incorporated verbatim section (b)(3) of the

NRA, 16 U.S.C. § 836(b)(3). All other sections of the NRA were similarly incorporated into PASNY's license. 19 F.P.C. at 193-95. The FPC's order also stated that the license was issued subject to the terms and conditions of the Federal Power Act, the NRA, and the 1950 Treaty, *Id.* at 193. The license was made effective on September 1, 1957, forward for a period of fifty years. *Id.* PASNY completed construction and commenced operation of the Niagara project in 1961.

In February, 1961, PASNY, in accordance with the NRA, entered into a contract with Niagara Mohawk—Contract NS-1—to sell a total of 1,190,000 kilowatts ("kW") of power to Niagara Mohawk for resale to various customers in compliance with the NRA.[4] Of this power, 445,000 kW was designated as Replacement Power to be sold, "in accordance with [the NRA]," to industrial customers within thirty miles of PASNY's Niagara switchyard. GM Item 9, Exh. 1, Part Two, Art. VI [hereinafter Contract NS-1]. PASNY specifically reserved the right within Contract NS-1 to adjust rates charged to Niagara Mohawk for Replacement Power.

> The rate schedules specified in this contract shall be subject to successive modification by the Authority [PASNY] through the promulgation of superseding rate schedules.

Contract NS-1, *supra*, General Power Contract Provisions, Part E.

---

[4]The Project has a rated capability of 1,880,000 kW, *see* GM Item 8, ¶ 12, the majority of which is sold to Niagara Mohawk. All Replacement Power is sold through Niagara Mohawk, however, in compliance with the NRA. 16 U.S.C. § 836(b)(3).

Also in February, 1961, when Replacement Power was first sold to Niagara Mohawk, PASNY set the price for such power as $1.00 per kilowatt month for demand and less than three-tenths of a cent (2.67 mills)[5] per kilowatt hour ("kWh") for energy, for an average cost to industry of less than one-half cent per kWh (4.38 mills). Contract NS-1, *supra,* Schedule NP-F1. This rate remained constant until 1990. GM Item 8, ¶ 19. Plaintiffs receive this Replacement Power pursuant to resale contracts with Niagara Mohawk at a price equal to Niagara Mohawk's cost plus a transmission and delivery charge. *See* Contract NS-1, *supra,* Exh. B; GM Item 9, Exh. 2.

On September 26, 1989, PASNY filed notice of its first proposed increase in Replacement Power rates since 1961. GM Item 8, ¶ 31. The President of PASNY, in a memorandum placed before the Trustees on that date, opined that although the price for Replacement Power "should, at a minimum, recover the cost of service, [it] need not be limited to that level." *See* Item 9, Exh. 5, at 16. The President also commented that additional revenue from sale of Replacement Power, if not needed under the terms of the "General Purpose Bond Resolution," could be used "for any lawful corporate purpose," including "funding the Authority's capital program, such as timely completion of the Niagara Expansion Project, or the advance retirement of debt." *Id.*

After public comment and response, *see generally* Item 9, Exh. 5, Richard M. Flynn, Chairman of PASNY, submitted a report to the Trustees on December 21, 1989, *id.* at 1-12, in which he recommended PASNY approve proposed price increases for 1990 and 1991 and defer decision on proposed increases for 1992-1997. *Id.* at 1. The Trustees adopted the

[5]One mill is equal to one-tenth of a cent.

Chairman's recommendations.[6] The new Replacement Power rate was implemented on January 1, 1990. GM Item 8, ¶ 38.

DISCUSSION

I. *"NO LAW TO APPLY"*

Plaintiffs' two federal causes of action hinge on the same language, which Congress in the NRA directed to be incorporated by the FPC into its license with PASNY. That language, quoted in full above, provided that PASNY "shall contract" to sell 445,000 kW of power to Niagara Mohawk—the amount produced by Project 16 prior to June 7, 1956—

> for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, *in order as nearly as possible to restore low power costs to such industries* and for the same general purposes for which power from project 16 was utilized. . . .

16 U.S.C. § 836(b)(3); 19 F.P.C. 186, 194 (emphasis added). Plaintiffs assert that this language bars PASNY from setting rates for Replacement Power above its own cost of producing that power.

Defendant counters that, according to a longstanding exception to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2), this language is merely precatory, leaving this court "no law to apply" in determining a proper rate for Replacement Power. *Webster*

[6]The 1990 rate is $1.47 per kilowatt month for demand and 2.51 mills per kWh for energy. The 1991 rate will be $1.68 per kilowatt month for demand and 2.88 mills per kWh for energy. GM Item 8, ¶ 39.

v. Doe, 486 U.S. 592, 599-600 (1988); *Heckler v. Chaney*, 470 U.S. 821, 828-31 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Although under the APA, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof," 5 U.S.C. § 702, and such review should be generously provided, *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970), *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967),[7] parties may not obtain such review where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

This "narrow exception" was first articulated in *Overton Park*, which held that the legislative history of the APA indicated it was applicable where " 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)" *Overton Park*, 401 U.S. at 410. It was explained in *Heckler*, which held that

> review is not to be had if the statute is drawn so that a court would have *no meaningful standard* against which to judge the agency's direction. In such a case, the statue ('law') can be taken to have 'committed' the decision making to the agency's judgment absolutely.

Heckler, 470 U.S. at 830 (emphasis added). *See also Webster*, 486 U.S. at 600.

In deciding whether a given statute provides a meaningful standard by which to review an agency's action, courts have looked to "the statutory language, the statutory structure,

[7]It must be noted that the breadth of judicial review is not dependent on the APA. *See e.g., Stark v. Wickard*, 321 U.S. 288, 307-10 (1944); *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 183 (1983).

the legislative history, and the nature of the agency action." *Singh v. Moyer,* 867 F.2d 1035, 1038 (7th Cir. 1989). *See Webster,* 486 U.S. at 600 (noting both *Overton Park* and *Heckler* required "careful examination of the statute on which the claim of agency illegality is based."); *New York Racing Ass'n v. N.L.R.B.,* 708 F.2d 46, 51 (2d Cir. 1983) (looking to "other indications of congressional intent: the nature of the agency action involved, the amount of expertise required, the place of the particular action and of judicial review in the overall statutory scheme governing the agency and, of course, the legislative history of the statute."); *Greater New York Hosp. Ass'n v. Mathews,* 536 F.2d 494, 499 (2d Cir. 1976) (reviewing the law itself, its legislative history, and other statutes); *Langevin v. Chenango Court, Inc.,* 447 F.2d 296, 303 (2d Cir. 1971). The "existence of some law generally applicable to the subject matter in question," however, may not be enough to permit review of an agency's decision. *City of Santa Clara v. Andrus,* 572 F.2d 660, 666 (9th Cir. 1978). "There is 'law to apply' only if a specific statute limits the agency's discretion to act in the manner which is challenged." *Id.*

Thus, were this doctrine applicable, the question for this court would be whether the language of the NRA, and specifically the phrase requiring PASNY to contract with Niagara Mohawk to sell 445,000 kW of power for resale to Niagara frontier industries "*in order as nearly as possible to restore low power costs to such industries,*" 16 U.S.C. § 836(b)(3) (emphasis added), coupled with the legislative history of the NRA, provides a meaningful standard to review PASNY's decision to increase its rate for Replacement Power.

Plaintiffs argue that this doctrine is inapplicable to this case because the exception, "no law to apply," precluding judicial review of agency action, is an exception based on

§ 701(a)(2) of the APA. 5 U.S.C. § 701(a)(2). *See Webster v. Doe*, 486 U.S. at 599-600; *Heckler v. Chaney*, 470 U.S. at 828-31; *Overton Park*, 401 U.S. at 410. That section states: "This chapter applies . . . except to the extent that . . . (2) *agency* action is committed to *agency* discretion by law." 5 U.S.C. § 701(a)(2) (emphasis added). Under the APA, " 'agency' means each authority of the Government of the United States . . ." 5 U.S.C. § 701(b)(1). PASNY is clearly not a federal agency. It is a corporate instrumentality of the State of New York. N.Y. Pub. Auth. law § 1002 (McKinney 1982). Nor can it be seen to take on federal agency status by virtue of its role under the NRA. "There must be 'extensive, detailed and virtually day-to-day supervision' by the federal government before 'federal agency' status can attach to a non-federal entity." *Singleton Sheet Metal Works v. City of Pueblo*, 727 F. Supp. 579, 581 (D. Colo. 1989) (citing *Forsham v. Harris*, 445 U.S. 169, 180 (1980); *United States v. Orleans*, 425 U.S. 807, 815-16 (1976)). Neither party contends that such federal supervision exists over PASNY. As a non-federal entity, therefore, the APA does not apply to it. *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 430 (1st Cir. 1983); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978); *Singleton Sheet Metal Works*, 727 F. Supp. at 581; *Ciccone v. Waterfront Comm'n of New York Harbor*, 438 F. Supp. 55, 58 (S.D.N.Y. 1977); *Birnberg v. Washington Metro. Area Transit Auth.*, 389 F. Supp. 340, 343 (D.D.C. 1975).

The court finds this argument persuasive. Judicial review is the rule, not the exception. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Laboratories*, 387 U.S. at 140-41; *Oregon Natural Resources Council v. Mohla*, 895 F.2d 627, 629 (9th Cir.), *cert. denied*, 110 S. Ct. 2621 (1990); *City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48, 53 (E.D.N.Y.

1989). Judicial review in this case is based not on the APA, but on the general grant of jurisdiction over federal questions, 28 U.S.C. § 1331, and on the express grant of jurisdiction found in the Federal Power Act:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter [under which PASNY's license was issued] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

16 U.S.C. § 825p. *See DiLaura v. Power Auth. of the State of New York*, 654 F. Supp. 641, 644 (W.D.N.Y. 1987); *Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp.*, 411 N.Y.S.2d 460, 463 (N.Y. App. Div. 1978). Defendant seeks to negate this review by applying an exception to judicial review clearly developed from the language and legislative history of the APA. *Webster v. Doe*, 486 U.S. at 599-600; *Heckler v. Chaney*, 470 U.S. at 828-31; *Overton Park*, 401 U.S. at 410. As discussed above, this exception applies by definition only to the actions of *federal* agencies. PASNY is not an agency within this exception. Therefore, there is no obstacle to a review of PASNY's actions.

Defendant cites two cases to support its claim that "no law to apply" doctrine also applies where state agency action is being reviewed. *Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Auth.*, 465 F.2d 1272, 1274 (3d Cir. 1972); *Delaware County Elec. Coop., Inc. v. Power Auth. of the State of New York*, 1985 WL 1620 (S.D.N.Y. June 11, 1984). Although these cases appear on point—

especially the latter case which rejected a challenge to PASNY's rate-setting decisions under the NRA—neither case is compelling. *Virgin Islands* based its extension of the "no law to apply" doctrine on the reasoning of *Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970), which held there was "clear and convincing evidence" that Congress had intended Federal Housing Authority control over rents to be committed to agency discretion. *Virgin Islands*, 465 F.2d at 1294. Under *Heckler*, however, the "clear and convincing" intent test was held to apply to bar judicial review under APA § 701(a) (1), not § 701 (a) (2), from which the "no law to apply" doctrine is derived. *Heckler*, 470 U.S. at 830. In *Delaware County*, there is no explanation at all for the extension of the "no law to apply" exception to a state agency's action. A search by the court found no other cases similarly precluding review of state agency action. The court therefore declines to extend this APA-based exception to this case. *See* K. Davis, ADMINISTRATIVE LAW TREATISE § 28.16 (1982 Supp.); K. Davis, "No Law to Apply," 25 San Diego L. Rev. 1 (1988); C. Koch, *Judicial Review of Administrative Discretion*, 54 Geo. Wash. L. Rev. 469, 497-99 (1986).

Accordingly, defendant's motion to dismiss complaint on this ground is denied.

ABSTENTION

Defendant alternatively argues that this court should abstain from exercising its jurisdiction for reasons of comity. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* involved a suit by the Sun Oil Company challenging the validity of an order of the Texas Railroad Commission granting Mr. Burford a permit to drill oil wells on his property in East Texas. The suit alleged violations of due

process, as well as state law, and was in federal court upon diversity grounds. The Court held that, given the extensive state regulatory scheme for maximizing oil production in Texas, a scheme thoroughly reviewable in state court, and the relative unimportance of the federal constitutional claims, the federal court should abstain. *Id.* at 334. The elements of the "*Burford* doctrine" have recently been reitterated by the Court.

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'

New Orleans Public Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) ("NOPSI II") (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814 (1976)).

Plaintiffs argue that this case does not fit under either of these categories. Although defendant argues extensively that this court should apply *Burford, see* GM Item 10, at 15-25; GM Item 13, at 19-30, their argument can be readily dismissed by a reading of NOPSI II. The issue in this case is not whether PASNY has properly applied New York's complex ratemaking regulations, *see NOPSI II,* 491 U.S. at 360 (citing *Burford,* 319 U.S. at 331 & n.28), or where the

success of plaintiffs' claim depends upon the " 'predominately local factor of public need for the service rendered.' " *NOPSI II*, 491 U.S. at 361 (quoting *Alabama Pub. Serv. Comm'n v. Southern Railway Co.*, 341 U.S. 341, 347 (1951)). As with *NOPSI II*,

> The present case does not involve a state law claim, nor even an assertion that the federal claims are 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'

NOPSI II, 491 U.S. at 361 (quoting *McNeese v. Board of Educ. for Community Unit School Dist., 187*, 373 U.S. 668, 674 (1963)). The issue in this case is solely *federal*: whether Congress, in directing PASNY to be licensed to construct and operate the Niagara power project under the NRA, also intended to authorize PASNY to prescribe rates for Replacement Power sold under the statute.

Defendant's argument that "courts have traditionally recognized that local utility ratemaking is a matter of substantial concern to the states," GM Item 10, at 17-20, thus merely begs the central question of this case, whether Congress under the NRA intended the rates for Replacement Power to be a matter of local discretion. Again, this is a federal question first. "[N]o inquiry beyond the four corners of" PASNY's rate order is needed to determine whether it violates the NRA or its license issued thereunder. *NOPSI II*, 491 U.S. at 363.

Finally, defendant's argument that state proceedings would be adequate to address plaintiffs' claims also fails. The state proceedings identified by defendant, GM Item 10, at 23-26; GM Item 13, at 28-30, simply do not address the federal questions posed by this case. *See, e.g., Airco Alloys*

Div., Airco, Inc. v. Niagara Mohawk Power Corp., 411 N.Y.S.2d 460, 464-65 (N.Y. App. Div. 1978) (specifically distinguishing state contractual claim from federal claim, and granting jurisdiction only under the former). Moreover, the Federal Power Act, 16 U.S.C. § 791 *et seq.*, provides for *exclusive* federal jurisdiction over "violations of this chapter or the rules, regulations, and orders thereunder. . ." 16 U.S.C. § 825p. Thus, at least with respect to plaintiffs' second cause of action—alleging that PASNY's rate increase violated its FPC licensing order—there could be no adequate state review.

Accordingly, defendant's motion to dismiss plaintiffs' federal claims is denied.

III. *PENDENT STATE CLAIMS*

Given the denial of defendant's motion to dismiss plaintiffs' federal claims, defendant's motion to dismiss plaintiffs' state claims is also denied.

A telephone conference shall be held on March 26, 1991, at 2 p.m. to set a further schedule.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: March 15, 1991

APPENDIX E—Niagara Redevelopment Act, 16 U.S.C. § 836 (1985)

Sec.

836. Authorization to license construction and operation; licensing conditions.

836a. Rules governing issuance of license.

§ 836. Authorization to license construction and operation; licensing conditions

(a) The Federal Energy Regulatory Commission is expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Energy Regulatory Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act [16 U.S.C.A. § 791a et seq.], the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) of this subsection available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for

the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Energy Regulatory Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Energy Regulatory Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Energy Regulatory Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

APPENDIX F—Letter from PASNY Chairman Robert Moses to Welles V. Moot, Counsel for the Basic Industries Power Committee (January 4, 1957).

POWER AUTHORITY OF THE STATE OF NEW YORK
270 Broadway
New York 7, N. Y.
Telephone Worth 4-4771

January 4, 1957

Mr. Welles V. Moot
Moot, Sprague, Marcy and Gulick
400 Erie County Savings Bank Bldg.
Buffalo 2, New York

Dear Welles:

I have your letter of December 20, 1956 relative to the Niagara Project. You indicate that you do not believe there is any difference between the major objectives of your clients and the Authority. If your clients are interested in the prompt development of a very substantial amount of relatively low cost power, produced by a businesslike organization in the shortest possible time and marketed at cost, the basic objectives are the same.

You state that your clients have no thought of doing anything whatever to oppose the designation of the Authority as the agency to take over and develop this power. What, however, are your clients doing in a constructive way to help the Authority obtain this license having in mind the fact that there is no substitute which will insure the start of construction?

As to power rates, we cannot guarantee anything at this time as final rates will depend upon the cost of construction and the bond market at the time the project is financed. All of the information which we have is available to you and to your clients. Our estimate of the amount of power to be generated and cost of construction as of last summer is in our August 20, 1956 application to the Federal Power Commission. We believe we can furnish power at lower rates than your clients are now paying, not to speak of the increases pending in the Public Service Commission.

We have retained the best engineering firm available for this specialized type of engineering and we will have the largest, best and most efficient contractors engaged in heavy construction bidding on the work.

Your clients have known for years that eventually 25 cycle equipment would have to be converted to 60 cycle. It serves no purpose to talk about producing 25 cycle power in this day and age. The 25 cycle type of plant is antiquated. We do not presume to tell your clients how to finance the conversion equipment but they can undoubtedly do so on a reasonable long-term basis.

We are glad that you recognize the merits of our letter of December 12th to the Chairman of the Joint Legislative Committee. It should be particularly significant to you that additional costs placed upon the Authority can have no other effect but to increase your clients' power bills. It is difficult for us to see how the Niagara Frontier communities can fail to recognize that the prompt construction of the new plant will result in immediate and substantial benefits to the area.

Sincerely,

/s/ROBERT MOSES
Chairman

APPENDIX G—Letter From Robert Moses, Chairman of PASNY, to Nelson A Rockefeller, New York State Governor (January 10, 1961).

POWER AUTHORITY OF THE STATE OF NEW YORK
The Coliseum Tower—10 Columbus Circle
New York 19, N. Y.
Telephone Columbus 5-6510

January 10, 1961

Honorable Nelson A. Rockefeller
Governor of the State of New York
Executive Chamber
The Capitol
Albany 1, New York

Dear Nelson:

We have received from your Counsel copies of several communications addressed to you critical of the power contracts which you have been asked to approve. The material submitted adds nothing to the objections already made and considered. What it boils down to is that the representative of a group of Buffalo industries says industry (or at least his clients) have not been treated well enough and some local politicians say industry has been treated too well at the expense of domestic and rural consumers.

Strangely enough, among the local politicians suggesting that industry has been treated too well is the Corporation Counsel of the City of Niagara Falls who took the lead in delaying the project and by obstructive tactics succeeded in adding materially to its cost. He seems to overlook completely the fact that the basic industries of Niagara Falls are

industries to which the cost of power represents a very important part of the cost of doing business and that these industries came to Niagara Falls in the first place only because cheap power was available and are able to remain there only if cheap power soon becomes available again.

Both groups objecting to the Authority's power contracts are involved in a controversy with the Niagara Mohawk Power Corporation pending before the Public Service Commission. They seek to inject the power contracts into that controversy. The Authority takes no sides in the controversy and its power contracts have nothing whatever to do with it.

Basically the situation is as follows:

After years of bickering and delay Congress in 1957 authorized The Power Authority to build the Niagara Power Project in order to relieve as quickly as possible the economic distress brought about by the collapse of Niagara Mohawk's Schoellkopf plant in 1956. Congress recognized that Niagara Mohawk has a Federal Power Commission License good at least until 1971 for a substantial amount of water and that all the water of the Niagara available to the United States had to be made available to the Authority in order to build the type of project which sound engineering and economics required to be built. Congress accordingly provided that the Authority sell Niagara Mohawk 445,000 kw of power for resale generally to the same industries which used Niagara power in the past in order to restore low-cost power as nearly as possible to them for the good of the community. This sale was contingent upon Niagara Mohawk's giving up its license and surrendering without compensation property rights in the use of the water many of which were based upon state grants.

Further recognizing the economic importance of high load factor industries to the Niagara frontier Congress departed from federal practice and provided that only half the

project's output should be subject to preference for rural and domestic consumers, particularly those served by rural co-operatives and municipal electric systems, thus allowing the Authority to sell up to half the power to industry. The Authority has conscientiously followed the federal and state statutes with the result that the first 445,000 kw produced will go to the completely essential industry which is the lifeblood of the frontier at the price it costs the authority to produce it plus a very reasonable wheeling charge to Niagara Mohawk which buys the power from the Authority and delivers it. Under the federal statute Niagara Mohawk actually purchases the 445,000 kw from the Authority and takes title to it. It is of course required to make the power available "for resale generally to the industries which purchased power produced by Project 16" from its own Niagara plant prior to the Schoellkopf disaster. This requirement is contained not only in the law but in the Authority's Federal Power Commission license and the Commission has a right to review the company's allocation of power to particular industries. The Authority's proposed contract with Niagara Mohawk gives the Authority the right to approve this allocation and any changes in it. The Authority believes the initial allocation is eminently fair and reasonable.

The Authority has set aside an additional 250,000 kw for allocation on a firm basis and 50,000 kw for allocation on a withdrawable basis to industry contingent upon the purchasers' agreeing to expand their operations, build new facilities, thus adding to the tax base and employ additional people. This power will also be sold through Niagara Mohawk at the Authority's cost plus a wheeling charge. So far about 200,000 kw have been allocated to industries which have agreed to the Authority's terms and we are negotiating with several companies with respect to the additional

100,000. This power for industry will all be sold as soon as it can be produced at the Authority's regular rates and will thus be available to meet our obligations to our bondholders.

In addition we have sold about 42,000 kw of power to rural cooperatives and municipal systems. Initially they will take about 30,000 kw and will take more as their loads increase. There are a few more municipalities and cooperatives which have not contracted for power but are expected to do so.

This power also will be delivered at the Authority's cost plus a reasonable wheeling charge.

Like the power sold to industry it will be sold at the Authority's regular rates from the outset and the benefits arising from the fact that it is cheaper than power produced from other sources will be achieved immediately.

The balance of the power will be sold to three power companies for resale to their rural and domestic consumers within the combined market area of the St. Lawrence and Niagara Projects. They will pass on to these consumers whatever savings they experience. The companies cannot absorb all this power (1,875,000 kw) immediately without shutting down some of their generating capacity. Therefore, since it costs money to keep this capacity in standby there will be a period in which the companies will not experience any savings and during part of the period they will experience losses.

This is true even under the payment schedule the contracts provide. Under this schedule they will pay no demand charge whatever at the outset when their generating capacity most exceeds the demand of their customers for power. They pick up the demand charges in steps until they pay them in full.

In the very beginning when the companies pay no demand charge whatever they will experience a slight savings on

power purchased from the Authority. This savings represents the difference between what fuel would cost if they produced the power in their own plants and what the Authority charges for the power it sells them.

Once the companies start paying demand charges the savings turn into losses and for a considerable time these losses will be substantial.

The contracts recognize that in all fairness the companies should be allowed to offset their losses against the savings experienced in the very beginning and those experienced after their loads catch up sufficiently with their capacity (including that purchased from the Authority) so that the total savings equal the total losses.

It is impossible to foresee when this balance will actually be effected. We believe that it will not be affected until the companies' loads amount to approximately 90% of their capacity. On the other hand we believe that it will be very nearly effected at that point.

We therefore agreed with the companies in the contracts that once their demands reach 90% of their loads full savings will from that point on be passed on to their customers. On the other hand we have provided in the contracts that the Authority may demand an accounting from the companies at any time and if it turns out that the total of the savings experienced by the companies catch up with the total of their losses experienced as a result of the purchase of Authority power before that time, future savings will immediately be passed on to their rural and domestic customers.

Attached is a staff memorandum answering some of the more flagrant misstatements in the letters of objections sent to you.

As you are of course aware the Authority is wholly dependent upon the approval by January 21, 1961, of the contracts now before you to meet its obligations.

First commercial power will be generated on February 10 and we must have a market for this power. Additional units will go on the line periodically and by the end of 1961 the Niagara plant will be operating close to capacity.

We must go into the bond market early this year to sell the remainder of the 720 million dollar issue. Our ability to sell these bonds will depend greatly upon the successful completion of our power marketing program.

We ask that you promptly approve these contracts.

Cordially,

/s/ ROBERT MOSES
Chairman

APPENDIX H—Excerpt From PASNY Official Statement (Series F Bonds) (January 5, 1959).

The following table sets forth the rates per kilowatt hour, for certain years, at which power would have to be sold from the Saint Lawrence and Niagara Projects to produce the gross revenues shown in the table, assuming sales of firm, interruptible, and secondary power, as estimated by the Consulting Engineers, of 6.5 billion kilowatt-hours from the Saint Lawrence Project in 1963 and thereafter, and of 13.0 billion kilowatt-hours from the Niagara Project in 1964 and thereafter. Such gross revenues represent the calculated net revenues shown in the preceding table after adding thereto operating expenses as estimated by the Consulting Engineers. Total estimated operating expenses amount to $2,700,000 for the Saint Lawrence Project (including $300,000 relating to the Transmission Line Projects) and $6,858,000 for the Niagara Project.

	Average rate per kwh (mills)			000's Omitted Gross revenues, calculated as above		
Calendar Year	St. Lawrence Project(a)	Niagara Project	Com-bined	St. Lawrence Project(a)	Niagara Project	Com-bined
1965	4.08(b)	4.32	4.24	$26,489(b)	$ 56,171	$82,660
1966	3.98	4.34(c)	4.22	25,860	56,372(c)	82,232
1970	3.81	4.01	3.95	24,789	52,180	76,969
1975	3.60	3.73	3.69	23,405	48,533	71,938
1980	3.29	3.47	3.41	21,390	45,168	66,558
1985	3.04	3.24	3.17	19,770	42,067	61,837
1990	—	—	1.98	—	38,702	38,702

(a) For purposes of this table, Saint Lawrence Project includes the Transmission Line Projects.

(b) Bond Service shown in the preceding table reaches the highest amount in 1965 for the Series A, Series B and Series C Bonds.

(c) Bond Service shown in the preceding table reaches the highest amount in 1966 for the Series E Bonds and Bonds of future series.

As hereinabove mentioned, the Authority has entered into contracts for the sale of all of the power from the Saint Lawrence Project. The Authority expects that well before completion of the Niagara Project it will enter into contracts for the sale of all of the power from the Niagara Project, which contracts will contain rates and charges substantially the same as those in the Saint Lawrence contracts. The following table sets forth the Authority's estimate of the amount of gross revenues which will be realized, based on the application of the rates and charges presently in effect under the Saint Lawrence contracts to the power contracted for from the Saint Lawrence Project and expected to be contracted for from the Niagara Project. The Consulting Engineers and Day and Zimmermann, Inc. have expressed the opinion that the Authority will be able to enter into contracts for the sale of all of the Niagara power on the basis indicated above and, further, have reviewed and concur in the estimates of power revenues of the Authority set forth in the following table.

	Saint Lawrence Project	Niagara Project (000's omitted)	Combined
Primary Power	$ 8,400(a)	$21,600(a)	$ 30,000
Primary Energy	13,884(b)	28,569(b)	42,453
Interruptible Energy	2,136(c)	-	2,136
Secondary Energy	1,000(d)	4,600(d)	5,600
Transmission Line Charges	1,474(e)	- (e)	1,474
Interest Earnings	-	-	1,000(f)
	$ 26,894	$ 54,769	$ 82,663

(a) Contract demand charge of $12 per kilowatt annually applied to primary power of 700,000 and 1,800,000 kilowatts, respectively.

(b) Energy charge of 2.67 mills applied to primary power of 5.2 and 10.7 billion kwh, respectively.

(c) 0.8 billion kwh considered interruptible power at 2.67 mills per kwh.

(d) 0.5 and 2.3 billion kwh, respectively, considered secondary power at 2.00 mills per kwh.

(e) These are the charges estimated to cover all annual costs of the Authority's transmission facilities constructed as part of "The Barnhart-Plattsburgh Transmittion Line Project" and "The Supplemental Transmission Lines Project". The Authority has not determined the amount of such charges with respect to the Niagara Project.

(f) Under the Bond Resolution the Authority is required to maintain a reserve equal to the ensuing year's Bond Service. As shown in the last column of the table on page 13 this requirement reaches $52,216,000 at the end of 1964. The Authority estimates that interest earned in 1965 on investment of the moneys in such reserve will at least equal $1,000,000.

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., and UNION CARBIDE CORPORATION,

Petitioners,

—against—

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR T. CAMBOURIS*
SARAH J. BERGER

CHARLES M. PRATT
Power Authority of the State
of New York
1633 Broadway
New York, New York 10019

Attorneys for Respondent Power Authority of the State of New York

**Counsel of Record*

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's determination that the Niagara Redevelopment Act does not mandate a Replacement Power rate set at cost.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 2

REASONS FOR DENYING THE WRIT 3

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT A CONFLICT OVER THE CONSTRUCTION OR APPLICATION OF ANY PRINCIPLE OF LAW 3

II. THE PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF THE NRA'S LANGUAGE AND LEGISLATIVE HISTORY WAS CORRECT 4

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Occidental Chem. Corp. v. Power Authority,
990 F.2d 726 (2d Cir. 1993) 5, 6

Occidental Chem. Corp. v. Power Authority,
786 F. Supp. 316 (W.D.N.Y. 1992) 4, 5, 6

STATUTES

Falcon Dam on the Rio Grande Act of 1945,
ch. 310, 68 Stat. 255 (1954) 5

Flood Control Act of 1944,
16 U.S.C. § 825s (1988) 5

Niagara Redevelopment Act,
16 U.S.C. § 836 (b)(3) (1985) ..... *passim*

N.Y. Civ. Prac. L. & R. § 7801 *et seq.*
(McKinney 1981 & Supp. 1993) 6

OTHER AUTHORITIES

H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957) 6

S. Rep. No. 539, 85th Cong., 1st Sess. (1957) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NO. 93-385

GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., and UNION CARBIDE CORPORATION,

Petitioners,

against

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case concerns the rate charged for a category of hydropower sold to industry from the New York Power Authority's Niagara Power Project known as "Replacement Power." Even after the recent increases of which petitioners complain, this power is sold at a rate which makes it among the cheapest electricity available to industries in the nation. Nonetheless, petitioners insist that the rates must be even lower. That claim is based exclusively on their strained interpretation of a phrase found in a federal statute, the Niagara Redevelopment Act ("NRA"). 16 U.S.C. § 836 (b)(3) (1985).

According to petitioners, that phrase guarantees them a rate which must be set at the cost of generating power at the Niagara Power Project. Petitioners proffered this interpretation of the phrase to the District Court and the Court of Appeals for the Second Circuit. In a forty-page opinion, the District Court carefully considered each of petitioners' arguments and rejected them. The Court of Appeals unanimously affirmed the judgment and denied rehearing. In both courts, petitioners' case was consolidated with that of two other plaintiffs. Those plaintiffs have not petitioned for writ of certiorari nor joined in this petition.[1]

In seeking certiorari, petitioners rely primarily on their disagreement with the lower courts' statutory construction. Both courts fully analyzed and rejected

---

[1]On September 30, 1993, one of those two plaintiffs provided the Court with a perfunctory letter noting that it "supports the request" that a writ of certiorari be issued. No reasons or arguments for granting the request were included.

petitioners' interpretation of the NRA. The decisions below are amply supported by the record and correctly decided on the law. Petitioners offer no compelling reason why this Court should grant certiorari, as required by Supreme Court Rule 10. Therefore, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT A CONFLICT OVER THE CONSTRUCTION OR APPLICATION OF ANY PRINCIPLE OF LAW.

Petitioners have not demonstrated any special or important reason for the exercise of this Court's discretion. No constitutional questions have been raised. The decision below does not conflict with either the decisions of this Court or the decisions of other circuit courts. Petitioners have also failed to show the presence of an issue of national importance. At issue is the interpretation of one phrase of a unique federal statute with very specific application. To our knowledge, the phrase at issue is not repeated in any other federal statute. As petitioners acknowledge, Replacement Power is a "unique category of electricity" sold to a "specific group of [industrial] customers." Petition for Writ of Certiorari ("Pet.") at 4.

II. THE PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF THE NRA'S LANGUAGE AND LEGISLATIVE HISTORY WAS CORRECT.

Petitioners' main argument in seeking a writ appears to be that the decision below was incorrect. In making this argument, petitioners merely rehash arguments raised and properly rejected by both lower courts. What they do not do is offer any substantial reason why this case warrants further review by this Court.

All parties agree that the issue here is one of statutory interpretation, and agree on which provision of the NRA is at issue. The NRA provides that Replacement Power is to be sold to Niagara area industries which had previously purchased power from Project 16, "in order as nearly as possible to restore low power costs to such industries." Petitioners find no fault with the lower courts' approach to statutory construction, conceding that the "ordinary meaning" of the statute controls its interpretation. Pet. at 13. Instead, they insist that the court erred when it rejected petitioners' unsupported "reading" of these words.

In their briefs to the courts below, petitioners argued that the NRA required a cost-based rate. This argument was soundly rejected, with both courts describing petitioners' interpretation as "quite contrived." *Occidental Chem. Corp. v. Power Authority*, 786 F. Supp. 316, 325 (W.D.N.Y. 1992) (Pet. App. 11a-48a, 31a);[2]

---

[2]References preceded by "Pet. App." are to the pages of the Appendices to the Petition.

Occidental Chem. Corp. v. Power Authority, 990 F.2d 726, 727 (2d Cir. 1993) (Pet. App. 3a-10a, 7a). Petitioners' interpretation of the NRA has become even more convoluted in its current form. Petitioners now argue that the NRA requires a cost-based rate *or* a rate set at 3 mills, whichever is higher. Pet. at 21.

However phrased, the particularized rate standard petitioners read into the NRA is unsupported by its text and legislative history. The words of the NRA's Replacement Power provision are expressive of general objectives, and not limitations or prohibitions. The provision makes no mention of rates or rate formulas. Nor is there a discussion of any prior rate at which Niagara Mohawk sold Project 16 power.[3] In marked contrast to other federal statutes, the NRA does not once refer to the cost of producing power, let alone enumerate the specific items that could be considered part of the Authority's costs.[4]

Indeed, the sole statutory reference to cost is to the power costs borne by the industries. In other words, Congress' focus was on the *customers*' costs, not on the

---

[3]The 445,000 kW generated by Project 16 was never sold at one uniform rate. Niagara Mohawk sold 273,000 kW of Project 16 power at the 3-mill rate, with the remaining 172,000 kW sold at a higher rate. *Occidental*, 786 F. Supp. at 320, 324 n.9 (Pet. App. 18a, 26a). And as the District Court pointed out, even the 3-mill rate was not set at cost. *Occidental*, 786 F. Supp. at 327 (Pet. App. 34a).

[4]In other hydroelectric power statutes, Congress expressly referred to rates, linked those rates to cost of production, and designated the specific costs which were to be recovered in the rates. *See* Falcon Dam on the Rio Grande Act of 1954, ch. 310, 68 Stat. 255 (1954); Flood Control Act of 1944, 16 U.S.C. § 825s (1988); *see also Occidental*, 786 F. Supp. at 326, 330 (Pet. App. 32a, 42a).

seller's cost of generation. Thus, the district court correctly concluded: "The phrase 'low power costs' means what it says: low-cost power. It does not mean 'at-cost' power." *Occidental*, 786 F. Supp. at 327 (Pet. App. 36a).

The legislative history echoes the language of the NRA, and demonstrates congressional concern for restoring a source of "low-cost power" to industry. H.R. Rep. No. 862, 85th Cong., 1st Sess. 8 (1957); S. Rep. No. 539, 85th Cong. 1st Sess. 8 (1957). Throughout this litigation, petitioners were unable to point to a single statement by any member of Congress which refers to a particular Replacement Power rate, let alone the specific cost-based rate standard they suggest.

Finally, petitioners claim that the court's interpretation of the NRA provides the Authority with "unfettered discretion," and that Congress could not have intended such a result. Pet. at i, 12. While this argument "begs the question of what Congress intended," *Occidental*, 786 F. Supp. at 332 (Pet. App. 47a), in fact, the statutory goal is the restoration of "low-cost power." Petitioners do not and cannot claim that this guideline has been violated. As the Court of Appeals noted, in quoting the District Court's opinion, "'Replacement Power is still apparently the cheapest firm industrial power in the United States, and by a wide margin.'" *Occidental*, 920 F.2d at 728 (Pet. App. 9a), quoting *Occidental*, 786 F. Supp. at 330 (Pet. App. 42a-43a). Moreover, should petitioners in the future claim that the Authority has abused its discretion in setting Replacement Power rates, its rate-setting actions are subject to review by New York state courts. N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1993).

It is petitioners, not the courts, who have "ignored the statutory language" of the NRA. Pet. at 21. While petitioners are clearly dissatisfied with the conclusion reached by the lower courts, their argument is a thinly disguised request for redrafting of the NRA. Both courts properly declined the request, finding that the NRA, as written by Congress, does not mandate a Replacement Power rate set at cost.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

DATED: New York, New York
October 8, 1993

Respectfully submitted,

Arthur T. Cambouris*
Sarah J. Berger

Charles M. Pratt
Power Authority of the
State of New York
1633 Broadway
New York, NY 10019
(212) 468-6151

Attorneys for Respondent
Power Authority of the
State of New York

Counsel of Record